Supreme Court, U.S.
FILED
94-69 JUL 6 1994
OFFICE OF THE CLERK

No. 94-

IN THE
Supreme Court of the United States

OCTOBER TERM, 1994

SUNKIST GROWERS, INC.,
Petitioner,
vs.
DEL MONTE CORPORATION
and
NABISCO BRANDS, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

LES J. WEINSTEIN
*WAYNE M. SMITH
GRAHAM & JAMES
801 South Figueroa Street
Suite 1400
Los Angeles, CA 90071
(213) 624-2500

Attorneys for Petitioner Sunkist Growers, Inc.

**Counsel of Record*

43 pp

QUESTIONS PRESENTED

1. Does the "evident partiality" standard under Section 10(a)(2) of the Federal Arbitration Act (9 U.S.C. §1 *et seq.*) apply to party-appointed arbitrators?

2. Does Section 4 of the Federal Arbitration Act (9 U.S.C. §4) compel arbitration on any claim which "presumes the existence" of an agreement containing an arbitration clause?

PARTIES TO THE PROCEEDING

All parties to the proceeding in the court of appeals are identified in the caption. Pursuant to Supreme Court Rule 29.1, Petitioner states that RJR Nabisco, Inc. is the parent company of Respondent Nabisco Brands, Inc.

TABLE OF CONTENTS

Questions Presented i

Parties to the Proceeding ii

Opinions Below 2

Jurisdiction 2

Statutes Involved 2

Statement of the Case 2

Reasons for Granting the Petition 8

I. The Petition Should Be Granted To Resolve Conflicting Decisions Regarding Whether The "Evident Partiality" Standard Under 9 U.S.C. §10(b) Applies To Party-Appointed Arbitrators 10

II. The Petition Should Be Granted To Resolve Conflicting Interpretations Of The Court's Opinion In *Commonwealth Coatings* 17

III. The Petition Should Be Granted To Clarify Whether The Court's Opinion In *Volt* Renders Unenforceable Arbitration Agreements That Provide For A Less Rigorous Standard Of Conduct Than That Imposed By 9 U.S.C. §10(a)(2) 22

IV. The Petition Should Be Granted To Resolve Conflicting Decisions Regarding The Use Of Equitable Estoppel To Compel Arbitration With Non-Signatories 26

Conclusion 30

Appendix A A1

Appendix B A17

Appendix C A18

Appendix D A31

Appendix E A39

TABLE OF AUTHORITIES

CASES

Aetna Casualty & Surety Co. v. Grabbert, 590 A.2d 88 (R.I. 1991) 12,20

Anderson v. Nichols, 178 W. Va. 284, 359 S.E.2d 117 (1987) 13,20

Apperson v. Fleet Carrier Corp., 879 F.2d 1344, 1353 (6th Cir. 1989) 19

Avila Group, Inc. v. Norma J. of California, 426 F. Supp. 537 (S.D.N.Y. 1977) 28

Astoria Medical Group v. Health Ins. Plan of Greater New York, 11 N.Y.2d 128, 182 N.E.2d 85, 227 N.Y.S.2d 401 (1962) 12-14,16,26

Barcon Associates v. Tri-County Asphalt Corp., 86 N.J. 179, 430 A.2d 214 (1981) 12,17

Bates v. Long Island R.R. Co., 997 F.2d 1028 (2d Cir. 1993) 28

Borough of New Cumberland v. Police Employees, 530 Pa. 1621, 467 A.2d 1294 (1983) 16

Brennan v. Stewarts' Pharmacies, Ltd., 59 Haw. 207, 579 P.2d 673 (1978) 12

Commonwealth Coatings Corp. v. Casualty Co., 393 U.S. 145, 89 S.Ct. 337 (1968) 10,17-21,25

Eagle Found, Inc. v. Dole, 813 F.2d 798 (7th Cir. 1987) 28

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 111 S.Ct. 1647 (1991) 9,26

Hanntz v. Shiley, Inc., 766 F. Supp. 258 (D.N.J. 1991) 6

Hines v. Anchor Motor Freight, 424 U.S. 554, 96 S.Ct. 1048 (1976) 8,24

Hines v. Davidowitz, 312 U.S. 52, 61 S.Ct. 399 (1941) 23

Hughes Masonry Co. v. Greater Clark County School Bldg. Corp., 659 F.2d 836, (7th Cir. 1981) 7,27,28

In re Domestic Air Transp. Antitrust Litig., 141 F.R.D. 556 (N.D. Ga. 1992) 6

J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A., 863 F.2d 315 (4th Cir. 1988) 7,27,28

Konstantinidis v. Chen, 626 F.2d 933 (D.C. Cir. 1980) 28

Lozano v. Maryland Casualty Co., 850 F.2d 1470 (11th Cir. 1988) 12-14

McAllister Bros. v. A. & S. Transp. Co., 621 F.2d 519 (2d Cir. 1980) 27

McBro Planning & Dev. Co. v. Triangle Elec. Constr. Co., Inc., 741 F.2d 342 (11th Cir. 1984) 7,27,28

Merit Insurance Co. v. Leatherby Insurance Co., 714 F.2d 673 (7th Cir. 1983) 12

Metropolitan Property & Cas. v. J.C. Penney Cas., 780 F. Supp. 885 (D. Conn. 1991), *aff'd*, 970 F.2d 899 (3d Cir. 1992) (table) 13,16

Middlesex Mut. Ins. Co. v. Levine, 675 F.2d 1197 (11th Cir. 1982) 19

Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 105 S.Ct. 3346 (1985) 9,26

Morelite Construction Corp. v. New York City, Inc., 806 F.2d 419 (2d Cir. 1986) 19

Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 103 S.Ct. 927 (1983) 9,26,27

Overseas Private Inv. Corp. v. Anaconda Co., 418 F. Supp. 107 (D.D.C. 1976) 19

Sanko S.S. Co. v. Cook Indus., 495 F.2d 1260 (2d Cir. 1973) 19

Scherk v. Alberto-Culver Co., 417 U.S. 506, 94 S.Ct. 2449 (1974) 9

Schmitz v. Zilveti, 20 F.3d 1043 (9th Cir. 1994) 19,21

Southland Corp. v. Keating, 465 U.S. 1, 104 S.Ct. 852 (1984) 24

Standard Tankers, Etc. v. Motor Tank Vessel, AKTI, 438 F. Supp. 153 (E.D.N.C. 1977) 12,16,17

Stef Shipping Corp. v. Norris Grain Co., 209 F. Supp. 249 (S.D.N.Y. 1962) 12,13,16

Stroh Container Co. v. Delphi Indus., Inc., 783 F.2d 743 (8th Cir. 1986) 8

Tamari v. Bache Halsey Stuart, Inc., 619 F.2d 1196 (7th Cir.), *cert. denied*, 449 U.S. 873 (1980) 19

Travelers Indem. Co. v. Swanson, 662 F.2d 1098, 1101 (5th Cir. Sept. 1981) 28

United States v. 49.10 Acres of Land, 802 F.2d 387 (10th Cir. 1986) 28

United Steelworkers v. Warrior & G. Nav. Co., 363 U.S. 574, 80 S.Ct. 1347 (1960) 26

Volt Information Sciences, Inc. v. Bd. of Trustees, 489 U.S. 468, 109 S.Ct. 1248 (1989) 22-24,26

STATUTES

9 U.S.C. §4 2

9 U.S.C. §9 9,25

9 U.S.C. §10 . . . . . 2, passim

28 U.S.C. §1254 2

Ala. Code §8-4-41 14

Alaska Stats. §09.43 *et seq.* 14

Ariz. Revised Stats. §12-1501 *et seq.* 14

Cal. Code Civ. Proc. §1281.2(c) 22

Cal. Code Civ. Proc. §1286.2(c) 15

12 Colo. Revised Stats., art. 22, §222 *et seq.* 14

Conn. General Stats. §52-418 15

Fla. Stat. §682.13(1)(b) 13

Ga. Code Annot. §9-9-93 15

Haw. Rev. Stats. §658-9 15

9 La. Rev. Stat. §4210 15

Miss. Code §11-15-23 15

2A N.J. Rev. Stat., chap. 24, §8 15

N.Y. Civ. Prac. Laws & Rules §7511 15

Ohio Rev. Code Annot. §2711.10 15

15 Okla. Stats. §801 *et seq.* 14

Ore. Rev. Stats. §36.355 15

Rhode Island Stat. §10-3-12(2) 15

Uniform Arbitration Act, §12(a)(2) 14,16

78 Utah Code Annot., ch. 31a, §14 15

12 Ver. Stats. §5651 *et seq.* 14

Wash. Stats. §7.04.160 15

W. Va. Code, ch. 55, art. 10, §1 *et seq.* 15

Wisc. Stats. §788.01 15

1 Wyo. Stats., ch. 36, §114[a] 14

MISCELLANEOUS

Brunet, *Arbitration and Constitutional Rights*, 71 N.C. L. Rev. 81 (1992) 18

Burger, *Agenda for 2000 A.D. – A Need for Systematic Anticipation*, 70 F.R.D. 79 (1976) 9

Burger, *Isn't There a Better Way*, 68 A.B.A.J. 274 (1982) 9

Code of Ethics for Arbitrators in Commercial Disputes (1977), Canon I 8,25

Goering, *The Standard of Impartiality as Applied to Arbitrators by the Federal Courts and Codes of Ethics*, 3 Geo. J. of Legal Ethics 821 (1990) 11,12,18,19

Uniform Acts, Martindale-Hubbel Law Digest, p. UMA-6 (1994) 14

Middleton, *Burger: Arbitrate More and Litigate Less*, 68 A.B.A.J. 257 (1982) 9

Reuben, *The Dark Side of ADR*, California Lawyer, Vol. 14, No. 2, p. 53 (Feb. 1994) 9

Sever, *The Relaxation of Inarbitrability and Public Policy Checks on U.S. and Foreign Arbitration: Arbitration Out of Control?*, 65 Tul. L. Rev. 1661 (1991) 9

Zubrod, *Evident Partiality and Misconduct of Arbitrators*, The Arbitrator, Vol. 25, No. 3, p. 5 (Soc'y of Maritime Arbs. Feb. 1994) 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

SUNKIST GROWERS, INC.,

Petitioner,

v.

DEL MONTE CORPORATION AND
NABISCO BRANDS, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner Sunkist Growers, Inc. ("Sunkist") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The December 30, 1993 opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 10 F.3d 753 and reproduced in Appendix ("App.") A, pp. A1-A16. The April 7, 1994 order of the United States Court of Appeals for the Eleventh Circuit denying Sunkist's petition for rehearing with suggestion for rehearing en banc is reported at 20 F.3d 1175 and is reproduced in App. B, p. A17. The December 5, 1991 order of the district court denying the motion to vacate the arbitration award is not reported: it is reproduced in App. C, pp. A18-A30. The June 7, 1988 order of the district court compelling arbitration is not reported: it is reproduced in App. D, pp. A31-A38.

JURISDICTION

The judgment of the Court of Appeals was entered on December 30, 1991. App. A, p. A1. A timely petition for rehearing was served and filed on January 19, 1994 and was denied on April 7, 1994. App. B, p. A17. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Sections 4 and 10 of the Federal Arbitration Act ("FAA" or "the Act"), 9 U.S.C. §§ 4 and 10, are reproduced in App. E, pp. A39-A41.

STATEMENT OF THE CASE

In the late 1970s, petitioner Sunkist Growers, Inc. ("Sunkist") entered into an agreement with General Cinema Corporation ("GCC") to develop and promote an orange-flavored soft drink to be marketed under the Sunkist trademark. To implement this plan, GCC created a subsidiary named Sunkist Soft Drinks, Inc. ("SSD") which had sole responsibility for the development, production, marketing and sales of Sunkist orange soft drinks, and GCC guaranteed SSD's performance. In turn, Sunkist and SSD entered into a Licensing Agreement whereby the

Sunkist trademarks were licensed to SSD in consideration for SSD's payment of a royalty and its commitment to use its "best efforts" to promote the Sunkist brand.

The Licensing Agreement also provided that Sunkist and SSD would arbitrate any disputes arising under the Agreement, except those concerning trademark rights.[1] Sunkist agreed to the arbitration clause since "the License Agreement represented a long term commitment between Sunkist and SSD, and . . . that arbitration under these circumstances would be an appropriate, non-public forum to resolve promptly the disputes that developed during th[e] relationship." (R3-54 at 7)

Sunkist orange soda quickly became an unprecedented success. Within a few years of the signing of the Agreement with GCC, the Sunkist brand had become the leading orange soft drink in the United States with a yearly case volume in excess of 100 million. In 1984, Del Monte Corporation ("Del Monte"), seeking to become the "third force" in the soft drink business, purchased all of the stock of SSD from GCC and added the Sunkist brand to its existing Canada Dry business. Del Monte declined, however, to undertake GCC's guarantee of SSD's performance under the License Agreement.

Less than a year after purchasing SSD, Del Monte's parent, R.J. Reynolds, merged with Nabisco Brands. New management immediately reversed the "third force" strategy and decided to exit the soft drink business. In exiting the soft drink business, Del Monte, motivated by a desire to enhance the value of its much larger Canada Dry subsidiary, used its position as SSD's sole shareholder to interfere with SSD's performance of the Licensing Agreement, including SSD's compliance with the "best efforts" provisions. Del Monte's interference included what Del Monte denominated the "milking program": diverting to Canada Dry the funding necessary to support the Sunkist brand in the market. As a result of this interference, during the twenty months of Del

---

[1] R4-63-8 (Eleventh Circuit record reference number). At the time the Licensing Agreement was signed, Sunkist had no relationship with Del Monte.

Monte's ownership of SSD, the Sunkist brand lost 40 per cent of its market share, and Sunkist's royalty payments declined.

Sunkist brought suit against Del Monte in federal district court in California in early 1987. The case was subsequently transferred to the Northern District of Georgia, whereupon Del Monte moved to compel arbitration under the arbitration clause in the Sunkist/SSD License Agreement. That clause provided, in relevant part:

> [A]ny controversy or claim arising out of or relating to this Agreement or the breach thereof, including those regarding termination or failure to renew this Agreement, shall be settled by arbitration in accordance with the Rules of the American Arbitration Association . . . . The Arbitration Tribunal shall be comprised of two party-designated arbitrators, one selected by Sunkist and one selected by SSD, and a third neutral arbitrator selected by the parties in accordance with the Rules of the American Arbitration Association . . . 10 F.3d at 755.

In support of its motion, Del Monte argued that even though there was no agreement to arbitrate between Sunkist and Del Monte, Sunkist was equitably estopped from refusing to arbitrate because Sunkist's claims were, in effect, attempts to recover under the License Agreement. Sunkist opposed Del Monte's motion on the ground that equitable estoppel could not apply since a party which has interfered with a contract should not be permitted to claim the benefit of the very contract with which it has interfered. The district court, however, held that Sunkist was required to arbitrate with Del Monte, finding that because "Sunkist is actually suing to enforce provisions of the licensing agreement," "Sunkist should be equitably estopped from refusing to submit its claims to arbitration." (R3-58 at 4, 9)

Following the Order referring the case to arbitration, and in accordance with the AAA Rules, Del Monte nominated Jesse Meyers, a well-known soft drink industry watcher, as its party-appointed arbitrator. Following his nomination, Mr. Meyers

provided Sunkist with the AAA-required disclosure letter which stated that "I have communicated with the party nominating me in connection with my nomination as a party-appointed arbitrator and my possible testimony as an expert witness in the underlying litigation. I intend to continue to communicate with them after my formal appointment."[2] No additional disclosures were made by Mr. Meyers prior to the commencement of the hearing.

After each party had appointed its arbitrator, a neutral arbitrator was appointed. Following his appointment, the neutral arbitrator urged the parties to discontinue communications with their appointed arbitrators.[3] While Sunkist was in agreement with this arrangement, Del Monte rejected it, asserting that it should be entitled to continue its communication with Mr. Meyers due to his lack of legal training. In a letter written to the neutral arbitrator, Del Monte's counsel stated that it had "appointed [Mr. Meyers] with the understanding that we would be allowed to continue to communicate with him and he with us" and had "assured him of the continuing ability to communicate with us regarding the legal aspects of the case and the rules governing the process."[4] Again, Del Monte did not disclose that Mr. Meyers either had, or intended to, meet with anyone other than Del Monte or its counsel.

It was not until just prior to the arbitration hearing in January 1991, that Sunkist first learned Mr. Meyers had participated in extensive meetings with *five* individuals who would ultimately testify as witnesses at the hearing: four third-party

---

[2] 10 F.3d at 756, n.1. The Eleventh Circuit's opinion states that "[t]he record clearly shows that Mr. Meyers announced in his formal disclosure letter that he had been in contact with Del Monte's experts before the parties were notified of his appointment and that he intended to continue to communicate with them after his formal appointment." 10 F.3d at 760. Yet, as the court earlier acknowledged, the disclosure letter clearly only states that Mr. Meyers *himself* might testify as an expert, not that he would meet with other experts. *Id.* at 756 n.1.

[3] R4-67 at 12.

[4] R4-67 at 21-22.

witnesses (including three former Del Monte employees)[5] and one expert retained by Del Monte. 10 F.3d at 756. These meetings, all of which were for the purpose of preparing testimony for the hearing, included: (1) a meeting with a third-party witness during which from one-half to two-thirds of his anticipated testimony was discussed (R4-67-13-15); (2) four days of meetings with Del Monte's expert, during which time Mr. Meyers discussed th expert's opinions and advised him on the content of his testimony (R4-67-13-14); and (3) meetings with former Del Monte employees Jack Argabright (two meetings), Fran Mullin (8 to 10 days) and Tommy Murray (one half day), to discuss their testimony. (R4-67-13) *Id.* None of these meetings, or the extent of Mr. Meyers' participation in them, was disclosed by Mr. Meyers -- a fact Del Monte does not dispute.

The arbitration hearing resulted in an award in favor of Del Monte on a 2-1 vote (Sunkist's party-appointed arbitrator dissenting). Sunkist thereafter moved to vacate the award on the ground, *inter alia*, that Mr. Meyers' conduct demonstrated "evident partiality" under 9 U.S.C. §10(a)(2). The district court denied the motion. (App. D at p. A31)

On appeal, the Eleventh Circuit rejected Sunkist's argument that the "evident partiality" standard under 9 U.S.C. §10(a)(2) governed Mr. Meyers' conduct, and disregarded as irrelevant this Court's precedent interpreting that standard, on the ground that "the case sub judice involves the conduct of a party-appointed arbitrator, which is easily distinguished . . ." 10 F.3d at 759. Rather than applying the law as expressed in 9 U.S.C. §10, and this Court's opinions, the Eleventh Circuit found that because the arbitration was under the auspices of the AAA, the question of whether Mr. Meyers had acted with "evident partiality" or committed "misconduct" would be determined by reference to whether he had

---

[5] While the Eleventh Circuit's opinion does not address the issue, it is clear that former employees are not parties, or representatives of parties. *See In re Domestic Air Transp. Antitrust Litig.*, 141 F.R.D. 556, 561 (N.D. Ga. 1992); *Hanntz v. Shiley, Inc.*, 766 F. Supp. 258, 269-70 (D.N.J. 1991) ("it cannot be said that a former employee is a party").

complied with the AAA Rules which, the court held, "recognize[] inherently different rules for neutral and nonneutral arbitrators." *Id.* Interpreting the AAA Rules by reference to cases decided under state statues which, in contrast to Section 10(a)(2) of the FAA, provide that party-appointed arbitrators may be "evidently partial," the court opined that "Mr. Meyers' conduct [was] not only unobjectionable, but commonplace." *Id.* On this basis, the Court held that Sunkist had failed to establish that Mr. Meyers had "acted improperly." *Id.* at 760.

The Eleventh Circuit also affirmed the district court's order compelling Sunkist to arbitrate with Del Monte. The court was not troubled by the fact that it was allowing Del Monte to reap the benefits of an agreement it had allegedly interfered with. Instead, relying on a questionable line of authority adopted by the Fourth, Seventh and Eleventh Circuits which holds that parties can be "equitably estopped" from resisting arbitration with non-signatories, 10 F.3d at 757,[6] the court held that Sunkist was required to arbitrate with Del Monte since each of its claims "presumes the existence of [the License Agreement]." 10 F.3d at 758.

The Eleventh Circuit's opinion has already attracted criticism. In an article appearing in the February 1994 issue of The Arbitrator, published by the Society of Maritime Arbitrators, a commentator observed that the court's endorsement of Mr. Meyers' conduct as "commonplace" was likely to be in conflict with the law of the Second Circuit:

> It is reasonable to suggest that had the litigation aspects of this case under review taken place in New York, and not under AAA auspices, the conduct of the party-appointed arbitrator of [Del Monte], as described, would not have been acceptable, nor even countenanced. It can be

---

[6] The cases which endorse the "equitable estoppel" theory are: *Hughes Masonry Co. v. Greater Clark County School Bldg. Corp.*, 659 F.2d 836, 840-41 (7th Cir. 1981); *McBro Planning & Dev. Co. v. Triangle Elec. Constr. Co., Inc.*, 741 F.2d 342, 344 (11th Cir. 1984); *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 320-21 (4th Cir. 1988).

> speculated that even if AAA Rules governed, the findings of a United States District Court for the Southern District of New York, given the exceptional specifics of conduct of the Del Monte arbitrator, would have differed from the results of the litigation reported and discussed above.[7]

Based on this and several other conflicts underscored by the Eleventh Circuit's opinion, Petitioner requests that the Court issue a writ of certiorari to review the judgment in this case.

REASONS FOR GRANTING THE PETITION

This Court has stated that while "Congress has put its blessing on private dispute settlement arrangements . . . it was anticipated we are sure, that the contractual machinery would operate within some minimum levels of integrity." *Hines v. Anchor Motor Freight*, 424 U.S. 554, 571, 47 L.Ed.2d 231, 245, 96 S.Ct. 1048 (1976). Indeed, the perceived integrity of alternative dispute resolution ("ADR") processes is essential to their acceptance by the public and litigants. The willingness of parties to waive the right to judicial resolution of their disputes is intimately bound up with their perception that ADR -- described as an otherwise "inferior system of justice, structured without due process, rules of evidence, accountability of judgment and rules of law"[8] -- will be not only fast and economical, but will provide some minimum standards of fairness and justice. As stated in the American Bar Association's Canons of Ethics: "In order for commercial arbitration to be effective, there must be broad public confidence in the integrity and fairness of the process."[9]

---

[7] Zubrod, *Evident Partiality and Misconduct of Arbitrators*, The Arbitrator, Vol. 25, No. 3, pp. 5-7 (Soc'y of Maritime Arbs. Feb. 1994).

[8] *Stroh Container Co. v. Delphi Indus., Inc.*, 783 F.2d 743, 751 n.12 (8th Cir. 1986).

[9] Code of Ethics for Arbitrators in Commercial Disputes, Canon I (ABA 1977). Recent writings describing the abuses which go unchecked and essentially unreviewed in ADR proceedings indicate that public confidence is already on the wane. *See* Reuben, *The Dark Side of ADR*, California Lawyer, Vol. 14, No. 2, p. 53 (Feb. 1994).

The courts, as well, have a strong interest in ensuring that ADR processes are fair, unbiased and just. Pursuant to Section 9 of the FAA, the courts stamp their imprimatur on ADR proceedings by lending their enforcement powers in aid of the awards. *See* 9 U.S.C. §9. Moreover, if more parties are willing to submit their disputes to private resolution, workloads on already overburdened courts will be relieved.[10]

The courts also have a public responsibility to ensure the fairness and integrity of ADR proceedings. Beginning in the early 1970s, this Court decided a series of cases which opened the door to an expanded role for ADR in our system of dispute resolution by announcing a "liberal federal policy favoring arbitration agreements."[11] The Court's announcement of this "liberal federal policy" fuelled the "emergence of an absolute deference to arbitration" in the courts.[12] It follows, however, that if courts are going to err on the side of ordering parties to arbitration, then they have a responsibility to ensure that the arbitral process does not violate basic principles of fairness. This means strict enforcement of the safeguards which Congress has specifically imposed on the arbitral process such as the "evident partiality" standard of Section 10(a)(2) of the FAA. As the Eleventh Circuit's opinion in this case demonstrates, however, the lower courts have taken this Court's "liberal federal policy" a step further by not only exhibiting an "absolute deference to arbitration," but also to *arbitration awards*.

---

[10] *See* Burger, *Agenda for 2000 A.D. – A Need for Systematic Anticipation*, 70 F.R.D. 79, 91, 92-94 (1976); Burger, *Isn't There a Better Way*, 68 A.B.A.J. 274-75 (1982); Middleton, *Burger: Arbitrate More and Litigate Less*, 68 A.B.A.J. 257 (1982).

[11] *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927 (1983); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511, 94 S.Ct. 2449 (1974); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (noting "the emphatic federal policy in favor of arbitral dispute resolution"); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24, 111 S.Ct. 1647, 1651, 114 L.Ed.2d 26, 36 (1991).

[12] Sever, *The Relaxation of Inarbitrability and Public Policy Checks on U.S. and Foreign Arbitration: Arbitration Out of Control?*, 65 Tul. L. Rev. 1661, 1672 (1991).

This in no small part due to the fact that while this Court has spoken several times in the past two decades on the issue of enforcing agreements to arbitrate, it has not in over twenty-five years addressed the question the *validity* of arbitration awards.[13]

The Eleventh Circuit's published opinion in this case undermines public confidence in the arbitration process and the validity of arbitration awards under the FAA. The court's sanction of the conduct of Del Monte's party-appointed arbitrator in disregard of the statutory language, and on the ground that his activities were "commonplace," clearly will result in such activities becoming "commonplace" in the tripartite arbitration setting. By carving out a "party-appointed arbitrator" exception to the "evident partiality" standard, the court has signaled that the selection of party-appointed arbitrators can now be reduced to the cynical exercise of choosing the best *advocate* for a party's position. As an advocate, the need for the party-appointed arbitrator to assume the entire advocate's role, including participation in the preparation of the case for hearing, becomes not only apparent, but critical -- as she will be expected to continue the argument in favor of her side's case during the "deliberations." Indeed, given the court's endorsement of Mr. Meyers' integral role in the preparation of Del Monte's case, it is clear that Del Monte could have appointed even its own lead trial counsel as arbitrator and still not have run afoul of the "evident partiality" standard of 9 U.S.C. §10(a)(2).

I. The Petition Should Be Granted To Resolve Conflicting Decisions Regarding Whether The "Evident Partiality" Standard Under 9 U.S.C. §10(a)(2) Applies To Party-Appointed Arbitrators

More than twenty-five years have passed since this Court last spoke on the issue of conduct of arbitrators in arbitration proceedings. That decision, *Commonwealth Coatings Corp. v. Casualty Co.*, 393 U.S. 145, 89 S.Ct. 337 (1968), addressed the standard of "evident partiality" of a "neutral" arbitrator under 9

---

[13] *Id.*, note 11, *supra*; *Commonwealth Coatings Corp. v. Casualty Co.*, 393 U.S. 145, 89 S.Ct. 337 (1968).

U.S.C. §10(a)(2). However, as commentators have noted, the *Commonwealth Coatings* opinion provided only limited guidance to the lower federal courts in interpreting the "evident partiality" requirement of 9 U.S.C. §10(a)(2), resulting in a "patchwork" of standards in the federal Courts of Appeals.[14] Moreover, the *Commonwealth Coatings* opinion can be interpreted as only directly addressing the conduct of "neutral" arbitrators, leaving courts to speculate the opinion's applicability to the conduct of party-appointed arbitrators. Predictably, this uncertainty has led to conflicting results among courts attempting to apply the *Commonwealth Coatings* holding to the evaluation of conduct of party-appointed arbitrators under Section 10(a)(2) of the FAA.[15]

The FAA's "evident partiality" standard is set forth at 9 U.S.C. §10(a)(2). In plain language it provides for vacating an arbitration award if *any* of the arbitrators on the panel were "evidently partial":

> In any of the following cases the United States district court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration --
>
> > (2) where there was evident partiality or corruption in the arbitrators, *or either of them.*

---

[14] Goering, *The Standard of Impartiality as Applied to Arbitrators by the Federal Courts and Codes of Ethics*, 3 Geo. J. of Legal Ethics 821, 824 (1990). The need for resolving the conflicting interpretations of *Commonwealth Coatings* is discussed in detail in Section III, *infra*.

[15] Much of the confusion surrounding the application of the "evident partiality" standard to party-appointed arbitrators results from the interplay of three different "standards" which potentially govern the conduct of every arbitration involving interstate commerce: (1) Section 10 of the FAA, (2) state arbitration statutes, and (3) the rules of arbitration agreed to by the parties, if any (here the AAA). The Eleventh Circuit's opinion in this case is exemplary of the confusion created by attempts to reconcile these standards as it purports to evaluate the party-appointed arbitrator's conduct under all three standards, including federal cases decided under state arbitration statutes expressly stating that the "evident partiality" requirement does *not* apply to party-appointed arbitrators. 10 F.3d at 759.

(Emphasis supplied.)[16] Notwithstanding its apparent plain meaning, as applied to party-appointed arbitrators this provision has been subjected to conflicting interpretations. One line of authority interprets this language strictly, holding that the phrase "and either of them" plainly means that the actions of *all* arbitrators on a panel, even those who are "party-appointed," are subject to review under the evident partiality standard.[17] A contrary line of authority, however, observes that party-appointed arbitrators have historically been expected to be partial, and either ignores the "evident partiality" standard completely, or holds that it does not apply.[18]

---

[16] Goering, *supra*, n.14 at 822 n.2 ("[b]ecause an arbitration proceeding is often heard by a panel of arbitrators, the statute refers to arbitrator in the plural").

[17] For example, the court in *Standard Tankers, Etc. v. Motor Tank Vessel, AKTI*, 438 F. Supp. 153 (E.D.N.C. 1977) observed:

> The view that Congress contemplated when enacting the Act that the parties would appoint partisan arbitrators is rebutted by the express language of §10(b). That section provides that the court shall vacate the award, "Where there was evident partiality or corruption in the arbitrators, or *either of them*." (Emphasis added.) This underlined language directs that the evident partiality test should apply to every member of the panel. Charterer's argument that *Commonwealth Coatings* does not apply to the case at bar because that decision involved only the third or neutral arbitrator is without merit . . .

Id. at 159, *accord, Barcon Associates v. Tri-County Asphalt Corp.*, 86 N.J. 179, 190, 430 A.2d 214 (1981) (holding under state statute modeled on 9 U.S.C. §10(a)(2) that "evident partiality" standard applies to party-appointed arbitrator); *Brennan v. Stewarts' Pharmacies, Ltd.*, 59 Haw. 207, 223, 579 P.2d 673, 682 (1978) (holding that under state statute modeled on 9 U.S.C. §10(a)(2) "[w]here an arbitrator, though appointed by a party, identifies himself personally with his party's prejudices and needs, as herein, the conclusion is unavoidable that the arbitrator has lost sight of his duty as an arbitrator, and is unable to act as an arbitrator"); *Aetna Casualty & Surety Co. v. Grabbert*, 590 A.2d 88, 94-95 (R.I. 1991) (same).

[18] *Merit Insurance Co. v. Leatherby Insurance Co.*, 714 F.2d 673, 679 (7th Cir. 1983); *Lozano v. Maryland Casualty Co.*, 850 F.2d 1470, 1472 (11th Cir. 1988) ("[a]n arbitrator appointed by a party is a partisan only one step removed from the controversy and need not be impartial"); *Stef Shipping Corp. v. Norris Grain Co.*, 209 F. Supp. 249, 253 (S.D.N.Y. 1962), *citing*, *Astoria Medical Group v. Health*

(continued...)

These latter decisions tend to disregard the statutory language of 9 U.S.C. §10(a)(2), instead emphasizing the "common acceptance" of biased arbitrators in tripartite panel proceedings.[19]

The Eleventh Circuit looked exclusively to this latter line of cases, which included one of its own decisions based on a state arbitration statute,[20] in concluding that Mr. Meyers' conduct was "unobjectionable." 10 F.3d at 759. A closer examination of these cases, however, reveals a common thread which places them, and many others like them, in conflict with the Section 10(a)(2) of the FAA. The holdings in the cases upon which the Eleventh Circuit relied, *Lozano* and *Stef*, are both premised on state rules of law which expressly provide that party-appointed arbitrators are *not* subject to an "evident partiality" standard. For example, in *Lozano*, the Eleventh Circuit reviewed the application of Fla. Stat. §682.13(1)(b) which provides that "the Court shall vacate an award when . . . [t]here is evident partiality by an arbitrator *appointed as a neutral*." 850 F.2d at 1471.[21] Similarly, in *Stef*, the court,

---

[18](...continued)
Ins. Plan of Greater New York, 11 N.Y.2d 128, 134, 182 N.E.2d 85, 87, 227 N.Y.S.2d 401, 404 (1962) (Fuld, J.) (noting "common acceptance" of party-appointed arbitrators); *Metropolitan Property & Cas. V. J.C. Penney Cas.*, 780 F. Supp. 885, 891 (D. Conn. 1991) (*citing Astoria* regarding "common acceptance" of partiality of party-appointed arbitrators), *aff'd*, 970 F.2d 899 (3d Cir. 1992) (table); *Anderson v. Nichols*, 178 W. Va. 284, 359 S.E.2d 117 (1987) ("[w]hen the concurring opinion [in *Commonwealth Coatings*] of Mr. Justice White, joined by Mr. Justice Marshall, is added to the majority opinion of Mr. Justice Black, it becomes obvious that the Supreme Court of the United States, under the United States Arbitration Act, 9 U.S.C. §§1-14, will look only at the neutrality of the neutral umpire").

[19] *Id.*

[20] *Lozano v. Maryland Casualty Co.*, 850 F.2d 1470, 1472 (11th Cir. 1988); *Stef Shipping Corp. v. Norris Grain Co.*, 209 F. Supp. 249, 251 (D.C.N.Y. 1962).

[21] In the opinion below, the Eleventh Circuit recognized this conflict, but then cast it aside on the ground that "[o]therwise, the similarity in language [between the FAA and the Florida statute] suggests similar legislative intent." 10 F.3d at 759, n.5. It is not at all surprising that the court was unable to cite authority for this novel method of statutory construction, which posits that Congress' intent in (continued...)

while purporting to construe the FAA, instead based its conclusions on a New York state court decision[22] -- not decided under the FAA -- which relied on pending New York legislation providing for "vacatur of an award only where the 'partiality' is that 'of an arbitrator appointed as a neutral.'"[23] Thus, the basis for the *Stef* and *Lozano* decisions was a rule of law which, contrary to the FAA, exempts party-appointed arbitrators from the "evident partiality" standard.

The overwhelming majority of decisions limiting the application of the evident partiality standard to "neutral" arbitrators have a common root: the Uniform Arbitration Act ("UAA").[24] Section 12(a)(2) of the UAA provides that:

> Upon application of a party, the court shall vacate an award where . . . [t]here was evident partiality by an arbitrator *appointed as a neutral* . . .[25]

Thirty-three states have adopted the UAA, and each of these has adopted Section 12(a)(2), either verbatim or in substance.[26] Five additional states, including New York, have enacted arbitration statutes which parallel the UAA's application of the "evident

---

[21](...continued)
enacting the FAA can be divined by reference to a conflicting state statute enacted several decades later. Once the court removed this apparent obstacle to the interpretation of the FAA under Florida law, it thereafter quoted the holding in *Lozano* that "'[a]n arbitrator appointed by a party is a partisan only one step removed form the controversy and need not be impartial.'" *Id., citing, Lozano*, 850 F.2d at 1472.

[22] *Astoria v. Health Insurance Plan of Greater New York*, 11 N.Y.2d 128, 182 N.E.2d 85, 227 N.Y.S.2d 401 (1962).

[23] *Astoria, supra*, 182 N.E.2d at 90, n.2.

[24] *Uniform Acts*, Martindale-Hubbel Law Digest, p. UMA-6 (1994).

[25] *Id.*

[26] *See, e.g.* Ala. Code §8-4-41; Alaska Stats. §09.43 *et seq.*, Ariz. Revised Stats. §12-1501 *et seq.*; 12 Colo. Revised Stats., art. 22, §222 *et seq.*; 15 Okla. Stats. §801 *et seq.*; 12 Ver. Stats. §5651 *et seq.*; 1 Wyo. Stats., ch. 36, §114[a].

partiality" standard to party-appointed arbitrators.[27] California dispenses with the evident partiality standard altogether, but emphasizes the higher standard to which neutral arbitrators will be held, providing for vacatur of the award if a party is "substantially prejudiced by misconduct of the *neutral* arbitrator."[28] In sum, nearly forty states have enacted arbitration statutes which dispense with the application of an "evident partiality" standard to party-appointed arbitrators.

The remaining states, however, have adopted "evident partiality" standards similar, if not identical, to the FAA's.[29] Not surprisingly, the courts of these latter states have more or less consistently held party-appointed arbitrators to the "evident partiality" standard.[30] Because the states which have enacted arbitration statutes patterned after the UAA form a substantial majority, however, the decisions from these jurisdictions are numerically dominant, and have had a disproportionate influence on federal courts' interpretation of the FAA's evident partiality standard.[31] This influence is seen in the Eleventh Circuit's opinion in the present case, where the court, even after acknowledging the conflict with the FAA, nonetheless relies on cases decided under state laws where only the *neutral* arbitrator is subject to the "evident partiality" standard. 10 F.3d at 759.

There is no precedent or logic which dictates that federal courts should rely on state court interpretations of the "evident partiality" requirement under the UAA or similar statute in evaluating the conduct of party-appointed arbitrators under the

---

[27] Ga. Code Annot. §9-9-93; Miss. Code §11-15-23; N.Y. Civ. Prac. Laws & Rules §7511; W. Va. Code, ch. 55, art. 10, §1 *et seq.*; Wash. Stats. §7.04.160.

[28] Cal. Code Civ. Proc. §1286.2(c).

[29] *See, e.g.*, Conn. General Stats. §52-418; Haw. Rev. Stats. §658-9; 9 La. Rev. Stat. §4210; 2A N.J. Rev. Stat., chap. 24, §8; Ohio Rev. Code Annot. §2711.10; Ore. Rev. Stats. §36.355; Rhode Island Stat. §10-3-12(2); 78 Utah Code Annot., ch. 31a, §14; Wisc. Stats. §788.01.

[30] *See, supra* n.17.

[31] *See, supra* n.18.

FAA. The statutes are fundamentally different, if not directly conflicting. The plain language of Section 10(a)(2) of the FAA indicates that the "evident partiality" standard must apply to party-appointed arbitrators, whereas Section 12(a)(2) of the UAA clearly states that the standard applies *only* to the neutral. While this fundamental conflict would appear to absolutely preclude reliance on cases decided under the UAA's "evident partiality" provision in FAA cases, just the opposite has occurred. Many courts, including the panel in this case, have inexplicably looked to cases decided under UAA-based statutes when evaluating the question of "evident partiality" under the FAA to support their conclusion that Section 10(a)(2) does not reach the conduct of party-appointed arbitrators.

There is similarly no basis for interpreting Section 10(a)(2), as the Eleventh Circuit did here, by reference to what has become "commonplace" in tripartite arbitration. 10 F.3d at 759. This trend began with the New York Court of Appeal's 1962 decision in *Astoria Medical Group v. Health Ins. Plan of Greater New York*, 11 N.Y.2d 128, 134, 182 N.E.2d 85, 87, 227 N.Y.S.2d 401, 404 (1962) (Fuld, J.), and has been an unfortunate substitute for statutory construction, and a proper evaluation of the underlying policies of the Act, ever since.[32] The fact that it is "commonplace" for party-appointed arbitrators to be "evidently partial" cannot, standing alone, mean that Section 10(a)(2) must be interpreted to permit such conduct.[33] Rather, the statute must be interpreted according to its intended meaning, and in a manner

---

[32] The *Astoria* court justified the nonneutrality of party-appointed arbitrators on the ground that their bias was a matter of "common acceptance." 11 N.Y.2d at 134, 182 N.E.2d at 87, 227 N.Y.S.2d at 404. Other courts that have voiced the same justification include: *Borough of New Cumberland v. Police Employees*, 530 Pa. 1621, 467 A.2d 1294, 1297 (1983); *Stef Shipping Corp. v. Norris Grain Co.*, *supra*, 209 F. Supp. at 251; *Metropolitan Property & Cas. v. J.C. Penney Cas.*, *supra*, 780 F. Supp. at 891. *Contra, Standard Tankers, Etc. v. Motor Tank Vessel, AKTI*, *supra*, 438 F. Supp. at 159.

[33] Indeed, it is not surprising that such conduct is "commonplace," given that in contrast with Section 10(a)(2) of the FAA nearly forty states have exempted party-appointed arbitrators from the "evident partiality" standard.

which will effect the policies underlying the FAA.[34]

The federal and state courts' efforts to apply the FAA's evident partiality standard to the conduct of party-appointed arbitrators has resulted in a confusing array of conflicting and irreconcilable standards which are of marginal guidance to arbitrating parties in assessing how they, and their opponents, should interact with their appointed arbitrators. The range of opinions on the subject leaves arbitrating parties to guess at whether they should regard their appointed arbitrators as "neutrals,"[35] or as the Eleventh Circuit did in this case, "partisan[s] only one step removed from the controversy." 10 F.3d at 759. Yet, to interpret Section 10(a)(2) of the FAA as the Eleventh Circuit has done here to not only allow the conduct of Mr. Meyers in this case, but to label it as "not only unobjectionable, but commonplace," does violence to both the policies and safeguards of the FAA, and the public's confidence in the integrity and fairness of arbitration. By granting the petition, the Court can resolve these conflicting authorities regarding the application of Section 10(a)(2) of the FAA to party-appointed arbitrators, and thereby preserve integrity and fairness in the tripartite arbitration setting.

II. The Petition Should Be Granted To Resolve Conflicting Interpretations Of The Court's Opinion In *Commonwealth Coatings*

In *Commonwealth Coatings*, *supra*, this Court, applying the "evident partiality" standard of 9 U.S.C. §10(a)(2), vacated an arbitration award where one arbitrator on a panel of three failed to disclose periodic business relations with one of the parties to the arbitration over the previous five to six years. 393 U.S. at 146. The Court reversed the district court's refusal to vacate the award grounded on the finding that "the arbitrator . . . was entirely fair and impartial," holding that a showing of actual bias was not

---

[34] *See Standard Tankers, Etc. v. Motor Tank Vessel, AKTI*, *supra*, 438 F. Supp. at 159.

[35] *See Barcon*, *supra*, 86 N.J. 179 at 190, 430 A.2d at 220.

required to establish evident partiality. In analyzing the conduct of the arbitrator in question under the "evident partiality" standard, the Court articulated a variety of factual showings which would rise to a level requiring vacatur of an arbitration award, including those that (1) "might create an impression of possible bias," (2) show the "appearance of bias," and (3) suggest that the arbitrator "might reasonably be biased against one litigant and favorable to the other." 393 U.S. at 149-50.

The *Commonwealth Coatings* decision has spawned confusion and conflict ever since it was decided. As commentators have observed:

> [T]he last word from the Supreme Court provided less than a clear standard to be followed by the lower federal courts which have subsequently grappled with the same issue. This murkiness was captured in an opinion of the United States Court of Appeals for the Second Circuit eighteen years after *Commonwealth*, where the court noted that "much of Justice Black's opinion must be read as dicta, and we are left in the dark as to whether an 'appearance of bias' will suffice to meet the seemingly more stringent 'evident partiality' standard of" the Arbitration Act.[36]
>
> * * *
>
> Lower courts have struggled with the "less than clear standard" [footnote omitted] of *Commonwealth Coatings*.[37]

The inability of the circuits to agree on the proper interpretation of the *Commonwealth Coatings* opinion is attributable to the opinion's overall structure. *Commonwealth Coatings* was decided by a four-justice plurality opinion authored by Justice Black, joined by a two-justice concurring opinion authored by

---

[36] *See* Goering, *supra*, n.14 at 824, *citing*, *Morelite Construction Corp. v. New York City, Inc.*, 806 F.2d 419, 423 (2d Cir. 1986).

[37] Brunet, *Arbitration and Constitutional Rights*, 71 N.C. L. Rev. 81, 98 (1992).

Justice White. Because a vote of one of the justices on the concurring opinion was required to form a majority vote of dismissal, Justice White's concurring opinion -- which has been interpreted to reject the "appearance of bias" standard of the plurality -- has been accorded substantial weight by many courts.[38] Other courts, however, have focused on the fact that Justice White's concurrence states that he is joining the "majority opinion" and is only writing to make "additional remarks." These courts conclude to varying degrees that the "appearance of bias" standard is, in fact, the holding of the Court.[39] These varying interpretations have led to a "patchwork of standards"[40] of what constitutes "evident partiality" under Section 10 of the FAA.

The dispute among the courts regarding the appropriate weight to be accorded Justice White's concurrence in *Commonwealth Coatings* has also affected the debate on whether the "evident partiality" standard of 9 U.S.C. §10(a)(2) applies to the conduct of party-appointed arbitrators. Those courts which have been inclined to accord substantial deference to Justice White's concurring opinion have broadly interpreted it to hold that party-appointed arbitrators are not subject to the evident partiality standard.[41] These courts have focused on Justice White's

---

[38] *See Middlesex Mut. Ins. Co. v. Levine*, 675 F.2d 1197, 1200 (11th Cir. 1982); *Morelite Construction Corp. v. New York City, Inc.*, 806 F.2d 419, 423 (2d Cir. 1986); *Apperson v. Fleet Carrier Corp.*, 879 F.2d 1344, 1353 (6th Cir. 1989); *Overseas Private Inv. Corp. v. Anaconda Co.*, 418 F. Supp. 107, 110 (D.D.C. 1976).

[39] *Schmitz v. Zilveti*, 20 F.3d 1043, 1045-48 (9th Cir. 1994); *Tamari v. Bache Halsey Stuart, Inc.*, 619 F.2d 1196, 1199-1200 (7th Cir.), *cert. denied*, 449 U.S. 873 (1980); *Sanko S.S. Co. v. Cook Indus.*, 495 F.2d 1260, 1263-65 (2d Cir. 1973).

[40] *See* Goering, *supra*, n.14 at 824.

[41] For example, the Supreme Courts of West Virginia and Rhode Island have both held that Justice White's language is an endorsement of the supposed partiality of party-appointed arbitrators:

> In *Commonwealth* there were two concurring opinions and three dissenting opinions. When the concurring opinion of Mr. Justice White,

(continued...)

statement that:

> The Court does not decide today that arbitrators are to be held to the standards of judicial decorum of Article III judges, or indeed of any judges. It is often because they are men of affairs, not apart from but of the marketplace, that they are effective in their adjudicatory function. . . . [A]rbitrators are not automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance, or if they are unaware of the facts but the relationship is trivial. I see no reason automatically to disqualify the best informed and most capable potential arbitrators.

393 U.S. at 150. Yet, nowhere in the concurrence does Justice White indicate that he is singling out party-appointed arbitrators for separate treatment under Section 10(a)(2) of the FAA. Rather, Justice White appears to opine that because persons familiar with a particular industry will often be desirable as arbitrators, it is foreseeable that such arbitrators may have had business relationships with the parties. Clearly, Justice White was not endorsing the notion, as some courts have interpreted his statements, that such arbitrators would be expected to be evidently

---

[41](...continued)

> joined by Mr. Justice Marshall, is added to the majority opinion of Mr. Justice Black, it becomes obvious that the Supreme Court of the United States, under the [Federal] Arbitration Act, 9 U.S.C. §§ 1-14, will look only at the neutrality of the neutral umpire.

Anderson v. Nichols, 178 W. Va. 284, 290, 359 S.E.2d 117, 123 (1987).

> We also cite with approval a similar position regarding the nonneutrality of party-appointed arbitrators espoused by Justice White in his concurring opinion in *Commonwealth Coatings* . . ., wherein he stated:
>
> > . . . arbitrators are not automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance . . .

Aetna Casualty & Surety Co. v. Grabbert, 590 A.2d 88, 93 (R.I. 1991).

partial, and this is the price to be paid for a knowledgeable arbitrator. Rather, the existence of the business relationship simply triggers a duty to disclose, and provides the parties with the opportunity to challenge that arbitrator's continued participation, if necessary. Thus, the fact that an arbitrator is not "automatically disqualified" by a business relationship does not inexorably lead to the conclusion that evident partiality will be expected or tolerated. Rather, it acknowledges the rather basic proposition that an arbitrator may well not be considered "evidently partial" by the mere fact of a prior business relationship.

In the present case, while the Eleventh Circuit did not expressly state that the concurrence in *Commonwealth Coatings* rendered the evident partiality standard of 9 U.S.C. §10(a)(2) inapplicable to party-appointed arbitrators, it held that the "appearance of bias" standard in *Commonwealth Coatings* plurality opinion was "easily distinguished" since "the case sub judice involves the conduct of a party-appointed arbitrator." 10 F.3d at 759. Moreover, the court quoted Justice White's concurrence for the proposition that party-appointed arbitrators are "expected to be predisposed toward the nominating party's case." 10 F.3d at 760.

The present case, therefore, presents an appropriate and convenient vehicle for clarifying the *Commonwealth Coatings* opinion, and for resolving a substantial conflict among the circuits. By resolving the question of whether an "appearance of bias" on the part of an arbitrator will suffice to support vacatur of an arbitral award, the Court can put to an end the conflict and debate on this issue among the various circuits[42] and can lend uniformity to the law in this area. Moreover, by resolving the interplay between the plurality and concurring opinions in *Commonwealth Coatings*, the Court will have the opportunity to provide clear guidance regarding the extent to which Justice White's concurrence can be read to support the proposition that party-appointed arbitrators are not subject to the evident partiality standard of 9 U.S.C. §10(a)(2).

---

[42] Most recently, this issue was debated in the Ninth Circuit's opinion in *Schmitz v. Zilveti*, 20 F.3d 1043, 1045-48 (9th Cir. 1994).

III. The Petition Should Be Granted To Clarify Whether The Court's Opinion In *Volt* Renders Unenforceable Arbitration Agreements That Provide For A Less Rigorous Standard Of Conduct Than That Imposed By 9 U.S.C. §10(a)(2)

The Eleventh Circuit's opinion in the present case well-illustrates the difficulties courts have experienced in attempting to identify the applicable standard for claims that an award should be vacated because of arbitrator bias. Uncertain whether the "evident partiality" standard set forth in 9 U.S.C. §10(a)(2) would apply to a party-appointed arbitrator, the Eleventh Circuit was swayed by the parties' agreement to incorporate by reference the AAA Commercial Arbitration Rules. Thus, the court implicitly ruled that Mr. Meyers' bias should be judged under AAA Canon VII, an exhortation for "good faith and . . . integrity and fairness" from arbitrators. 10 F.3d at 759. Like the UAA provisions providing that standards of impartiality and fairness do not apply to party-appointed arbitrators, however, the AAA standard is in conflict with the "evident partiality" standard set forth in 9 U.S.C. §10(a)(2), raising the question of whether under the FAA a party may seek enforcement of an arbitral award that would not meet the FAA's "evident partiality" standard.

This Court previously has had occasion to address, in a different context, the capacity of parties to stipulate to the rules under which their arbitrations will proceed, and the related question of pre-emption of state arbitration statutes that conflict with the FAA. In *Volt Information Sciences, Inc. v. Bd. of Trustees*, 489 U.S. 468, 109 S.Ct. 1248 (1989), this Court affirmed a decision of the California Court of Appeal that a California statute[43] providing for the stay of arbitration pending the outcome of a court proceeding on a "related transaction" was not preempted by the FAA. 489 U.S. at 479, 109 S. Ct. at 1252, 1254. In upholding the California Court of Appeal, the Court held that the California statute (which was applied by virtue of the parties' selection of California law to govern their agreement) was not preempted by the

---

[43] Cal. Code Civ. Proc. §1281.2(c).

FAA in view of "the FAA's primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms." 489 U.S. at 479, 109 S. Ct. at 1255.

In *Volt* the parties were allowed to arbitrate according to the terms of their agreement precisely because that agreement did not offend any overriding principle of the FAA, or directly conflict with any of its provisions:

> [W]e think the California arbitration rules which the parties have incorporated into their contract generally foster the federal policy favoring arbitration. As indicated the FAA itself contains no provision designed to deal with the special practical problems that arise in multiparty contractual disputes when some or all of the contracts at issue include agreements to arbitrate.

489 U.S. at 478, 109 S. Ct. at 1254, n.6. Thus, the Court held in *Volt* that "it does not follow that the FAA prevents the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself." 489 U.S. at 478, 109 S. Ct. at 1255. Conversely, however, this Court also recognized that the FAA imposed certain limits upon the parties' freedom to agree to varying procedures, noting that:

> [S]tate law may nonetheless be pre-empted to the extent that it actually conflicts with federal law -- that is, to the extent that it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'

Id., *quoting*, *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404 (1941). Similarly, in addressing the related situation where (as here) the parties had agreed to adopt the rules of an arbitration association rather than the arbitration law of a particular state, the Court held that such agreements would be enforced rigorously, but only to the extent that enforcement would not "do[] violence to the

policies behind the FAA." 489 U.S. at 479, 109 S.Ct. at 1256.[44]

As framed by these principles, this case presents a substantial question of first impression: whether an arbitration award may be enforced by federal courts pursuant to the mandate of the FAA, where the underlying arbitration agreement incorporates arbitration rules specifying a less stringent standard for arbitrator conduct. Resolution of this issue will potentially have far-reaching impact, for if agreements incorporating state statutes or private rules that allow arbitrators -- including party-appointed arbitrators -- to render binding awards notwithstanding their "evident partiality," are held to be unenforceable because they do "violence to the policies behind the FAA,"[45] then the nearly forty state statutes which hold only the neutral arbitrator to the "evident partiality" standard are, of necessity, pre-empted in cases where the FAA would otherwise apply.

Petitioner submits that agreements which purport to substitute a less restrictive standard of arbitrator conduct than that required by 9 U.S.C. §10(a)(2) do violence to the fundamental policies and protections of the FAA, and for that reason should not be enforced. This Court has emphasized that the "contractual machinery" of private arbitration must "operate within some minimum levels of integrity," *Hines v. Anchor Motor Freight*, *supra*, 424 U.S. at 571. Indeed, courts "should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review."

---

[44] Indeed, this Court previously has held state arbitration statutes that conflicted with the express purposes of the FAA to be pre-empted. For example, in *Southland Corp. v. Keating*, 465 U.S. 1, 10, 104 S.Ct. 852, 858 (1984), a state statute which provided that arbitration clauses directed to wage collection claims were unenforceable was found to be pre-empted by the FAA. The Court held that state laws which "require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration" were contrary to one of the principal purposes underlying the enactment of the FAA -- the enforcement of private arbitration agreements according to their terms. *Id.*

[45] *Volt*, *supra*, 109 S.Ct. at 1256.

Commonwealth Coatings, *supra*, 393 U.S. at 149. 89 S.Ct. at 337. The "minimum levels of integrity" referred to in *Hines* are expressly delineated at 9 U.S.C. § 10, and this Court's own authority suggests that application cannot be limited to only a part of the arbitration panel, irrespective of how the panel members were selected. Thus, in *Commonwealth Coatings*, this Court did not limit the application of 9 U.S.C. § 10(a)(2) to only neutral arbitrators, but required that "*any* tribunal permitted by law to try cases and controversies not only be unbiased but also must avoid even the appearance of bias." 393 U.S. at 150, 89 S.Ct. at 340 (emphasis supplied).

By the express provisions of the FAA, Congress has lent its authority and that of the federal courts, not to any arbitration award, but those rendered impartially. *Commonwealth Coatings*, 393 U.S. at 147, 89 S.Ct. at 338. Moreover, because the public's acceptance of private arbitration as an alternative to courtroom litigation is directly related to the perceived integrity and fairness of arbitration proceedings,[46] it is essential that the minimum standards for arbitrator conduct outlined in the FAA not be compromised. Section 10 of the FAA is the only condition upon the federal courts' obligation to apply their imprimatur and enforcement powers to arbitration awards. 9 U.S.C. § 9. To permit the parties (or the states) to accord equal dignity to awards rendered by arbitrators subject to a lesser standard of fairness not only frustrates Congress' intent, it demeans and ultimately threatens the viability of arbitration as a rational alternative to litigation in the courts.

The language of Section 10(a)(2) of the FAA would hardly appear susceptible to a construction that would allow interested parties to the dispute to serve as arbitrators. Yet, the decision in the present case, as well as the vast majority of state arbitration statutes, contains nothing that would render the composition of such a panel improper. While no decision directly addresses the question presented here, as discussed above, certain courts have exhibited a tolerance for the appointment of "partisan" or

---

[46] Code of Ethics for Arbitrators in Commercial Disputes (1977), Canon I.

"nonneutral" arbitrators, principally on the ground of "common acceptance."[47] Unfortunately, many courts' analysis of the question of whether a party-appointed arbitrator is subject to the "evident partiality" standard ends with the observation that "usage and experience" indicate that such arbitrator is not expected to be neutral.[48] This type of perfunctory "everybody is doing it" analysis is no substitute for proper statutory construction as it glosses over the important policies of impartiality underlying the Federal Arbitration Act. It is also an obstacle to resolving the important question raised here: whether parties are free to agree that a standard of arbitrator conduct less than that prescribed by Section 10(a)(2) of the FAA will be enforced, or whether such an agreement does violence to the policies underlying the Act.

IV. The Petition Should Be Granted To Resolve Conflicting Decisions Regarding The Use Of Equitable Estoppel To Compel Arbitration With Non-Signatories

While this Court has repeatedly made broad pronouncements encouraging the "liberal" enforcement of arbitration agreements,[49] it has also stated that whether a party has agreed to arbitrate "is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."[50] Thus, the question of whether a party has actually *agreed* to arbitrate its disputes with another is held to be governed by "[o]rdinary principles of contract and agency."[51]

---

[47] *See, e.g. Astoria Medical Group v. Health Ins. Plan of Greater New York, supra*, 11 N.Y.2d at 134, 182 N.E.2d at 87, 227 N.Y.S.2d at 404.

[48] *Astoria, supra*, 11 N.Y.2d at 134, 182 N.Y.2d at 87, 227 N.Y.S.2d at 405.

[49] *See Moses H. Cone, supra*, 460 U.S. at 24, 103 S.Ct. 927 (noting the "liberal federal policy in favor of arbitration agreements"); *Gilmer, supra*, 500 U.S. at 24, 111 S.Ct. 1647 (same); *Mitsubishi Motors, supra*, 473 U.S. at 625, 105 S.Ct. 3346 (same).

[50] *United Steelworkers v. Warrior & G. Nav. Co.*, 363 U.S. 574, 582, 80 S.Ct. 1347 (1960), *accord, Volt, supra*, 489 U.S. at 478, 109 S.Ct. at 1255.

[51] *McAllister Bros. v. A. & S. Transp. Co.*, 621 F.2d 519, 524 (2d Cir. 1980).

This Court has *never* announced a "liberal federal policy" on the issue of "standing" to compel arbitration, *i.e.*, a policy in favor of contract interpretation requiring parties to arbitrate with non-signatories to arbitration agreements.[52] Rather, the policy is addressed to questions of "arbitrability," *i.e.*, the scope of the arbitrable issues embraced by the agreement *once standing has been established*.[53] Notwithstanding this distinction, three circuit courts have extended this Court's policy statements regarding the scope of arbitration agreements to the threshold question of standing by applying a modified form of "equitable estoppel" to compel non-signatories to arbitrate.[54] Under this theory, the Eleventh Circuit in the present case broadly held that a party is "equitably estopped" from resisting arbitration of any claim which "presumes the existence of [an arbitration agreement]." 10 F.3d at 758. This so-called "estoppel" is based on a supposed inconsistency in attempting to hold a non-signatory liable on a tort claim which merely presumes the existence of an agreement, while simultaneously asserting that the non-signatory is not entitled to the benefit of the arbitration clause in that agreement.[55]

The line of authority on which the Eleventh Circuit relied in support of this proposition is of doubtful merit as it is in conflict with traditional applications of equitable estoppel. The doctrine of "equitable estoppel" is generally held by the circuits to require proof of the following elements: (1) a representation of a material fact to the party claiming the estoppel; (2) a change in position by the party making the representation; and (3) detrimental reliance by the party claiming the estoppel.[56] Yet, none of the decisions

---

[52] In *Moses H. Cone* the Court held that the "liberal federal policy" applied to issues of "construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." 460 U.S. at 24, 103 S.Ct. at 941.

[53] *Id.*, 460 U.S. at 24-25.

[54] *See Hughes Masonry, supra*, 659 F.2d at 840-41 (Seventh); *McBro, supra*, 741 F.2d at 344 (Eleventh); *J.J. Ryan, supra*, 863 F.2d at 320-21 (Fourth).

[55] *See, supra* n.54.

[56] *See, e.g., Travelers Indem. Co. v. Swanson*, 662 F.2d 1098, 1101 (5th Cir. Sept. 1981).

which apply the "equitable estoppel" theory as a device to compel arbitration refer to these elements, or articulate how equitable estoppel can be established without proving detrimental reliance.[57] Part of the circuits' inability to properly apply the traditional elements of "equitable estoppel" to the issue of arbitration standing in the *Hughes Masonry, McBro* and *J.J. Ryan* decisions is due to the mislabeling of the doctrine. What these courts actually meant to apply was "judicial estoppel" -- a related, although separate, doctrine with different elements.

Del Monte acknowledged this in its response to Sunkist's rehearing petition, stating that the courts are actually applying "a form of the estoppel against assertion of inconsistent positions in court, sometimes described in the cases as 'judicial estoppel.'"[58] Those circuits which recognize judicial estoppel,[59] define the doctrine as preventing a party from taking inconsistent positions in litigation where the court adopted the prior inconsistent statement in some manner.[60] As applied in the arbitration context, the doctrine would prevent a party from asserting that it was not required to arbitrate with a non-signatory to an agreement, where that party had previously *and successfully* asserted that the non-

---

[57] None of the "equitable estoppel" decisions in the arbitration context address the element of reliance and detriment. In *Hughes Masonry, supra*, the Seventh Circuit held that "equitable estoppel" applied where a party was attempting "'to claim the benefit of the contract and simultaneously avoid its burdens.'" 659 F.2d at 840-41, *quoting, Avila Group, Inc. v. Norma J. of California*, 426 F. Supp. 537, 540 (S.D.N.Y. 1977). The elements necessary to establish equitable estoppel were, however, never set forth. *Id.* Similarly, in *McBro, supra*, the Eleventh Circuit held that equitable estoppel applied where "the [plaintiff's] claims are 'intimately founded in and intertwined with the underlying contract obligations.'" 741 F.2d at 344, *quoting, Hughes Masonry, supra*, 659 F.2d at 841 n.9. Again, however, the elements of equitable estoppel were not discussed. *Id.*

[58] *See* Del Monte's Letter Response to Suggestion for Rehearing En Banc, filed March 14, 1994 at p. 9.

[59] The Tenth and D.C. Circuits have not recognized the doctrine. *United States v. 49.10 Acres of Land*, 802 F.2d 387, 390 (10th Cir. 1986) (rejecting doctrine); *Konstantinidis v. Chen*, 626 F.2d 933 (D.C. Cir. 1980) (same).

[60] *See Eagle Found, Inc. v. Dole*, 813 F.2d 798, 810 (7th Cir. 1987); *Bates v. Long Island R.R. Co.*, 997 F.2d 1028, 1037 (2d Cir. 1993).

signatory could be held liable for breaching the agreement. While the authorities which have applied equitable estoppel in the arbitration context have improperly ignored the requirement of *reliance* by the court, the Eleventh Circuit's opinion goes much further by broadening the "estoppel" doctrine to dispense with even the requirement of an inconsistent position -- the very essence of an estoppel.

Sunkist's claim against Del Monte was for tortiously interfering with Sunkist's contract with SSD. Sunkist did not assert that Del Monte was liable for breaching that contract, nor was there any inconsistency in Sunkist attempting to hold Del Monte liable for interfering with a contract, while denying that Del Monte had any rights under that contract. Indeed, the fact that a party has no right to interfere with, or otherwise claim the benefit of, a contract to which it is not signatory is the very essence of a tortious interference claim. The Eleventh Circuit, however, held that the mere fact that Sunkist's claim "presume[d] the existence" of the contract, meant that Sunkist was required to arbitrate with the party that had interfered with that contract. 10 F.3d at 758. In other words, the court rewarded Del Monte for its interference by allowing it to assume the rights of a contracting party, while penalizing Sunkist for objecting to Del Monte's conduct *even though that objection was in no way inconsistent with a refusal to arbitrate with Del Monte*.

The Eleventh Circuit's holding that a party can be compelled to arbitrate any claim which "presumes the existence of . . . an agreement" containing an arbitration provision defeats the reasonable expectations and intentions of contracting parties, clearly conflicts with this Court's authority that the existence of an agreement to arbitrate is a matter of contract, and cannot be reconciled with any judicially recognized estoppel doctrine. Common sense and logic dictate that if estoppel applies at all, it should apply to the party accused of interfering with a the contract, not the party seeking redress for the interference. Not even a "liberal federal policy" favoring arbitration agreements supports the unwarranted extension of the "equitable estoppel" doctrine to require parties to arbitrate who have never agreed to do so, simply

because their dispute is in some way connected with an agreement with a third party which contains an arbitration clause.

CONCLUSION

This Court's repeated admonition that the lower courts should implement a "liberal federal policy" favoring arbitration has resulted in an "absolute deference" to arbitration which has begun to erode the protections which Congress built into the FAA. This is an unfortunate development, as the safeguards which Congress has imposed on arbitration proceedings are not only important guarantees of the integrity and fairness of arbitral proceedings, they foster public confidence in arbitration and thereby provide an incentive for parties to agree to non-judicial dispute resolution. In view of the need to preserve these safeguards and to protect the integrity of arbitration under the FAA, Petitioner respectfully prays that the Court issue a writ of certiorari to review the judgment of the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

LES J. WEINSTEIN
* WAYNE M. SMITH
GRAHAM & JAMES
801 South Figueroa St.
Suite 1400
Los Angeles, CA 90071
(213) 624-2500

Attorneys for Petitioner
Sunkist Growers, Inc.

* *Counsel of Record*

July 6, 1994

APPENDICES

APPENDIX A

SUNKIST SOFT DRINKS, INC., Plaintiff,
Del Monte Corporation, Nabisco Brands,
Inc., Plaintiffs-Appellees,

v.

SUNKIST GROWERS, INC.,
Defendant-Appellant.

No. 91-9153.

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

10 F.3d 753

December 30, 1993, Decided

SUBSEQUENT HISTORY: As Amended. Suggestion for Rehearing En Banc Denied April 7, 1994, Reported at: 20 F.3d 1175.

PRIOR HISTORY: Appeal from the United States District Court for the Northern District of Georgia. No. 1:86-CV-1583-RLV, Robert L. Vining, Jr., Judge.

DISPOSITION: AFFIRMED.

COUNSEL: For Defendant-Appellant: Emmet J. Bondurant, II, BONDURANT MIXSON & ELMORE, Edward Bryan Krugman, Atlanta, GA. PEPPER HAMILTON & SCHEETZ, Deseriee A. Kennedy, Robert G. Badal, Wayne M. Smith,

Jill F. Cooper, Martin J. Trupiano, GRAHAM & JAMES, Les J. Weinstein, Los Angeles, CA. For Plaintiffs-Appellees: David R. Aufdenspring, POWELL GOLDSTEIN FRAZER & MURPHY, PC, Atlanta, GA. Virginia S. Taylor, KILPATRICK & CODY, Atlanta, GA. George L. Little, Jr., PETREE STOCKTON & ROBINSON, Rodrick J. Enns, J. David Mayberry, Winston Salem, NC.

JUDGES: Before ANDERSON, Circuit Judge and MORGAN and JOHNSON, Senior Circuit Judges.

OPINION BY: MORGAN

OPINION: [*755] MORGAN, Senior Circuit Judge:

The appellant appeals the district court's order granting the appellees' motion to compel arbitration pursuant to the Federal Arbitration Act and the denial of appellant's subsequent motion to vacate the arbitration award. We must decide whether a nonsignatory to a contract may invoke an arbitration provision contained therein, and if so, whether appellees' party-appointed arbitrator acted improperly. We AFFIRM the district court's judgment.

BACKGROUND

The defendant-appellant, Sunkist Growers, Inc. (hereinafter "Sunkist") is the exclusive owner and licensor of the "Sunkist" trademark. General Cinema Corporation ("GCC") obtained the contractual right from Sunkist to market and sell an orange soda under the "Sunkist" brand name. To produce and market this soft drink, GCC created a wholly owned subsidiary known as Sunkist Soft Drinks ("SSD"). Subsequently, Sunkist and SSD entered into a license agreement which provided a detailed framework for the marketing and sale of "Sunkist" soft drinks. The license

agreement included the following arbitration clause:

> Except for any claim with respect to the ownership rights in Licensed Trademarks, *any controversy or claim arising out of or relating to this Agreement or the breach thereof*, including those regarding termination or failure to renew this Agreement, *shall be settled by arbitration in accordance with the Rules of the American Arbitration Association*, and judgment upon the award rendered by the Arbitrators may be entered in any Court having jurisdiction thereof. The Arbitration Tribunal shall be comprised of two party-designated arbitrators, one selected by Sunkist and one selected by SSD, and a third neutral arbitrator selected by the parties in accordance with the Rules of the American Arbitration Association. (emphasis added).

In November 1984, Del Monte Corporation ("Del Monte") acquired the stock of SSD from GCC. After acquiring the stock, Del Monte absorbed SSD into its own beverage products division, known as Del Monte Franchised Beverage Products. By placing the "Sunkist" brand under a single administration with its own soft drink brands, Del Monte effectively stripped SSD of its employees and management and any other separate operating status.

On July 18, 1986, Del Monte and its wholly owned subsidiary, SSD, filed a declaratory relief action against Sunkist in the District Court for the Northern District of Georgia seeking a declaration that the controversy relating to SSD's performance under the license agreement was subject to arbitration. Shortly after the original complaint was filed, SSD was sold to a third party, Cadbury Schweppes, Inc., a fact that was reflected in Del Monte's amended complaint, which also added Nabisco Brands, Inc., Del Monte's sister

company, as a party plaintiff.

On February 2, 1987, Sunkist filed a separate complaint against Del Monte and SSD in the District Court for the Central District of California. Sunkist asserted ten claims against Del Monte and SSD, some sounding in tort and some in contract, arising out of Del Monte's alleged interference with the Sunkist-SSD license agreement.

On March 12, 1987, the district court approved SSD's dismissal of its claims against Sunkist in the Georgia action, and Sunkist voluntarily dismissed SSD from the California action. On November 20, 1987, Sunkist filed counterclaims against Del Monte in the Georgia action alleging essentially the same ten claims that were then pending in the California action, plus an eleventh claim for abuse of process. Sometime thereafter, the California action was transferred to the Northern District of Georgia and became a companion to this case.

On October 5, 1987, Del Monte filed a motion to compel arbitration on the grounds that Sunkist was contractually obligated to [*756] arbitrate its claims under the terms of the license agreement. The district court granted Del Monte's motion to compel arbitration. Sunkist filed an interlocutory appeal from that order which this court dismissed, sua sponte, for lack of jurisdiction following the 1988 amendment of 9 U.S.C. § 16 (formerly § 15, renumbered by amend. 1990). Each party designated an arbitrator and then mutually agreed upon a third, neutral arbitrator pursuant to the license agreement and the Rules of the American Arbitration Association ("AAA"). Del Monte designated Jessie Meyers as its party-appointed arbitrator.

During the time leading up to the arbitration hearing, Mr. Meyers met with counsel and other representatives of Del

Monte to prepare for the hearing. Mr. Meyers met with six individuals identified by Sunkist: Argabright, Mullin, Murray, Watson, Antle, and O'Reilly. Argabright, Mullin, and Murray, were all former Del Monte employees and officers who were responsible for Del Monte's conduct during the relevant time period. Watson and Antle were consultants retained by Del Monte. Mr. O'Reilly was a third party witness interviewed by Del Monte's counsel in Mr. Meyers' presence. After being designated as an arbitrator, Mr. Meyers made a written disclosure to the AAA pursuant to Cannon VII of the AAA's Code of Ethics for Arbitrators in Commercial Disputes.[1] Prior to the arbitration hearing, Sunkist filed a motion with the AAA requesting that the AAA refrain from confirming Mr. Meyers appointment to the arbitration panel based on his prehearing contact with potential witnesses. The AAA refused to withdraw the appointment, and Sunkist raised

---

[1] The disclosures by Mr. Meyers included the following:

> 1. Pursuant to Cannon VII.A.1, I fully understand that even though I may be predisposed for the parties that appointed me, I am nevertheless obligated to act in good faith with integrity and fairness.
>
> 4. As permitted by Cannon VII.C.(2), I have communicated with the party nominating me in connection with my nomination as a non-neutral arbitrator and my possible testimony as an expert witness in the underlying litigation. I intend to continue to communicate with them after my formal appointment. I further understand that under the code of ethics applicable to the non-neutral arbitrators in this proceeding that, having announced my intention to continue communicating with the parties appointing me I am not required to make any further disclosure regarding my future communications.

the matter with the district court. The district court declined to rule on the merits of the motion, concluding that it was premature and should be decided only after the arbitration award was rendered.

The arbitration panel, in a two-to-one decision with Sunkist's party-designated arbitrator dissenting, entered an award in favor of Del Monte. Sunkist then moved to vacate the award, relying on allegations of misconduct by Mr. Meyers. The district court denied the motion to vacate the award and granted the motion to confirm. This appeal followed.

STANDARD OF REVIEW

We review *de novo* the district court's order compelling arbitration. *McBro Planning & Dev. Co., v. Triangle Elec. Constr. Co., Inc.*, 741 F.2d 342, 343 (11th Cir.1984). We review the district court's order confirming the arbitration award under the Federal Arbitration Act and denying Sunkist's motion to vacate the same for an abuse of discretion. *Schmidt v. Finberg*, 942 F.2d 1571, 1573 (11th Cir.1991).

DISCUSSION

I. The Arbitration Clause

Initially, Sunkist asserts that the district court erred in determining, as a matter of law, the arbitrability of its claims against Del Monte. Sunkist argues that a factual issue exists as to whether Sunkist consented to arbitrate with Del Monte, and therefore, it is entitled to a jury trial on this issue

pursuant to 9 U.S.C. § 4 (1970).[2] Although arbitration [*757] is a contractual right that is generally predicated on an express decision to waive the right to trial in a judicial forum, this court has held that the lack of a written arbitration agreement is not an impediment to arbitration. *McBro*, 741 F.2d at 344. Sunkist concedes that there are certain limited exceptions, such as equitable estoppel, that allow nonsignatories to a contract to compel arbitration. In the instant case, there is no dispute that an arbitration agreement existed between Sunkist and SSD. The only issue before us regarding the arbitration clause is whether Sunkist is equitably estopped from contesting Del Monte's standing to invoke the clause, which is a question of law. There being no issue of material fact, Sunkist is not entitled to a jury trial and the district court was correct in resolving this issue as a matter of law.

Sunkist next contends that the district court improperly invoked the doctrine of equitable estoppel in granting Del Monte's motion to compel arbitration. The district court, following the reasoning of the Seventh Circuit in *Hughes Masonry Co. v. Greater Clark County School Bldg. Corp.*, 659 F.2d 836 (7th Cir.1981), held that Sunkist was equitably estopped from asserting the lack of a written agreement as a defense. Sunkist argues that it did not consent to nor intend to arbitrate any claims with Del Monte. Absent a written agreement to arbitrate with Del Monte itself, Sunkist asserts

---

[2] 9 U.S.C. § 4 provides:

> "If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue ... the party alleged to be in default may demand a jury trial of such issue, and upon demand the court shall make an order referring the issue or issues to a jury...."

that the district court erred in compelling arbitration.

In *Hughes Masonry*, the plaintiff-contractor sought to avoid arbitration because a construction manager involved in the dispute was not a signatory to the construction agreement containing the arbitration provision. The Seventh Circuit noted that, although the plaintiff had characterized its claims against the construction manager as sounding in tort, i.e., intentional and negligent interference with contract, in substance the complaint was based on the manager's alleged breach of the obligations and duties assigned to it in the agreement. *Hughes Masonry*, 659 F.2d at 838. The Seventh Circuit held that since the plaintiff ultimately must rely on the terms of the construction agreement in its claims against the construction manager, the plaintiff was equitably estopped from repudiating the arbitration clause of the agreement. *Id.* at 840-41.

This court adopted the reasoning of *Hughes Masonry* in *McBro Planning & Dev. Co. v. Triangle Elec. Constr. Co., Inc.*, 741 F.2d 342 (11th Cir.1984). On facts nearly identical to *Hughes Masonry*, this court held that a party may be estopped from asserting that the lack of a written arbitration agreement precludes arbitration. *Id.* at 344. The *McBro* court noted the close relationship between the entities involved, as well as the relationship of the alleged wrongs to the nonsignatory's obligations and duties in the contract, and decided that the claims were "intimately founded in and intertwined with the underlying contract obligations." *Id.*

The license agreement at issue here does not specify or make mention of any duties or obligations that Del Monte owes to Sunkist. On this basis, Sunkist attempts to distinguish the instant case from *McBro* and *Hughes*. Although the nonsignatories were expressly mentioned in the contracts at issue in *McBro* and *Hughes Masonry*, and each court took this

into account, the reference to a third party was neither a crucial nor dispositive factor in either case. Instead, these decisions rest on the foundation that ultimately, each party must rely on the terms of the written agreement in asserting their claims. The references in the contracts to the nonsignatories merely added further support to the courts' conclusions that the claims against the third parties were "intimately founded in and intertwined with the underlying contract obligation." Indeed, the Fourth Circuit has adopted the reasoning of *McBro* and applied it to facts that are nearly identical to the instant case. *See J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315 (4th Cir.1988). In *J.J. Ryan*, the Fourth Circuit stated that "when the charges against a parent company and its subsidiary are based on the same facts and are inherently inseparable, a court may refer claims against the parent to arbitration even though the parent is not formally a party to the arbitration agreement." *Id.* at 320-21. Therefore, the focus of our inquiry should be on the nature of the underlying claims asserted [*758] by Sunkist against Del Monte to determine whether those claims fall within the scope of the arbitration clause contained in the license agreement.

Arguably, the eleven counterclaims filed by Sunkist against Del Monte sound in tort.[3] However, "it is well established

---

[3] The counterclaims were for:

> (1) tortious interference with contract; (2) tortious interference with prospective advantage; (3) trademark infringement; (4) unfair competition in violation of 15 U.S.C. § 1125; (5) unfair competition in violation of the California Business Code; (6) conspiracy to breach contract; (7) conspiracy to breach the covenant of good faith and fair dealing; (8) civil conspiracy; (9) fraudulent misrepresentation; (10) declaratory relief;

that a party may not avoid broad language in an arbitration clause by attempting to cast its complaint in tort rather than contract." *McBro*, 741 F.2d at 344.[4] Essentially, Sunkist contends that Del Monte, through its management and operation of SSD, caused SSD to violate various terms and provisions of the license agreement. Each claim asserted by Sunkist makes reference to the license agreement. Although Sunkist does not rely exclusively on the license agreement to support its claims, each claim presumes the existence of such an agreement. We find that each counterclaim maintained by Sunkist arises out of and relates directly to the license agreement.

In addition, upon acquiring ownership of SSD, Del Monte ceased operating it as an independent enterprise and absorbed it into Del Monte's own internal soft drink division. For all practical purposes, SSD lost its independent operating status and became a part of Del Monte. The nexus between Sunkist's claims and the license agreement, as well as the integral relationship between SSD and Del Monte, leads us to the conclusion that the claims are "intimately founded in and intertwined with" the license agreement. Therefore, we hold

---

and (11) abuse of process.

[4] The arbitration clause at issue in this case provides that "any controversy or claim arising out of or relating to this Agreement or the breach thereof, including those regarding termination or failure to renew this Agreement, shall be settled by arbitration." This language is nearly identical to the language used in the arbitration clauses in *Hughes Masonry*, 659 F.2d at 837 (all disputes "arising out of, or relating to, this contract or the breach thereof ... shall be decided by arbitration"); and *Mcbro*, 741 F.2d at 343 (any controversy "arising out of or relating to this [Contract] or the breach thereof" shall be settled by arbitration).

that Sunkist is equitably estopped from avoiding arbitration of its claims. II. Arbitrator Conduct Sunkist contends that the conduct of Jessie Meyers, the party-designated arbitrator chosen by Del Monte, was sufficiently inappropriate to constitute evident partiality and prejudicial misconduct in violation of § 10(a)(2) and (a)(3) of the Federal Arbitration Act, 9 U.S.C. § 1 et seq. Sunkist moved to vacate the arbitration award pursuant to § 10 which provides that a district court may vacate an arbitral award in certain limited circumstances, including: (2) Where there was evident partiality or corruption in the arbitrators, or either of them. (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced. 9 U.S.C. § 10(a). The district court denied Sunkist's motion and confirmed the award.

Sunkist argues that we should impose upon a party-appointed arbitrator the burden of avoiding even the appearance of bias and that the mere possibility of bias is sufficient to justify a finding of evident partiality. *See Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 89 S. Ct. 337, 21 L. Ed. 2d 301 (1968) (Rule requiring neutral arbitrators to disclose any substantial relationships they may have with the arbitration parties is based on the premise of avoiding the appearance of bias.). The Eleventh Circuit has addressed the issue of a neutral arbitrator's conduct and found that any conduct that creates "a reasonable appearance of bias" warrants setting aside an arbitration award on the ground of "evident partiality." [*759] *See Middlesex Mutual Ins. Co. v. Levine*, 675 F.2d 1197 (11th Cir.1982); *Lozano v. Maryland Casualty Company*, 850

F.2d 1470 (11th Cir.1988).[5]

However, the case sub judice involves the conduct of a party-appointed arbitrator, which is easily distinguished from the above cited cases. The AAA, under whose rules the parties were contractually bound to proceed,[6] recognizes inherently different rules for neutral and nonneutral arbitrators and imposes less exacting duties and less burdensome disclosure rules upon nonneutral arbitrators.

Sunkist concedes that Mr. Meyers, as a party-appointed arbitrator, may be predisposed or sympathetic toward Del Monte's position. *See* AAA Code of Ethics for Arbitrators in Commercial Disputes, Canon VII (Party-appointed arbitrators "may be predisposed towards the party who appointed them but in all other respects are obligated to act in good faith and with integrity and fairness."); *see generally Lozano*, 850 F.2d at 1472 ("An arbitrator appointed by a party is a partisan only one step removed from the controversy and need not be impartial.") (applying Florida arbitration statute). However, the AAA does require that nonneutral arbitrators act in good faith and with integrity and fairness. *See* Code of Ethics for

---

[5] Both *Middlesex* and *Lozano* review the application of Fla.Stat. 682.13(1) to the conduct of a neutral arbitrator. Fla.Stat. 682.13 differs from 9 U.S.C. § 10 in that the Florida law limits the application of the "evident partiality" standard only to neutral arbitrators. Otherwise, the similarity in language suggests similar legislative intent. *Middlesex*, 675 F.2d at 1200.

[6] Unlike this case, the Rules of the AAA were not controlling in *Commonwealth Coatings*, 393 U.S. 145, 149, 89 S. Ct. 337, 339, 21 L. Ed. 2d 301.

Arbitrators in Commercial Disputes, Cannon VII.[7] Consequently, Mr. Meyers conduct as a party-appointed arbitrator must be evaluated to determine whether he acted in good faith and with integrity and fairness.

Sunkist alleges that before the arbitration but after his appointment as Del Monte's arbitrator, Mr. Meyers assisted Del Monte in preparing its case by attending and participating in meetings with Del Monte's witnesses, that he suggested lines or areas of testimony, that he helped select one of Del Monte's consultants, and that he advised an expert witness on how to improve a chart related to the expert's testimony. Sunkist argues that in meeting with Del Monte's representatives and witnesses in preparation for the hearing, Mr. Meyers engaged in the *ex parte* receipt of evidence. However, none of the Del Monte representatives nor the third party witness, Mr. O'Reilly, were placed under oath before being interviewed, and none gave testimony in any sense of the word. Sunkist has made no showing that Mr. Meyers discussed any information that he received during the prehearing interviews with the other arbitrators, or that any of the arbitrators, including Mr. Meyers, based their deliberations and award on anything other than the evidence of record. Mr. Meyers' conduct is not only unobjectionable, but commonplace. *E.g. Stef Shipping Corp. v. Norris Grain Co.*, 209 F. Supp. 249, 251 (D.C.N.Y.1962) ("The fact that [a party-appointed arbitrator] consulted with his nominator prior to the arbitration hearing is not shocking. It would be unrealistic to expect a party engaged in an arbitration dispute to nominate an arbitrator without telling him what the dispute

---

[7] In defining the standard, Cannon VII provides as an example that a non-neutral arbitrator "should not engage in delaying tactics or harassment of any party or witness and should not knowingly make untrue or misleading statement to the other arbitrators."

is about. It must be pointed out that there is no evidence that the award itself was based upon evidence or documents not before the arbitration panel, only that [the party-appointed arbitrator] had conferred with respondent prior to the start of the arbitration hearings.... This is not the type of irregularity which [9 U.S.C. § 10] contemplates as being sufficient to vacate an otherwise valid arbitration award.")

Sunkist also contends that Mr. Meyers exhibited evident partiality because he prejudged critical points of the dispute between Sunkist and Del Monte in a publication called *Beverage Digest*, a biweekly soft-drink industry newsletter owned and published by [*760] Mr. Meyers. Sunkist points to the fact that before Mr. Meyers' appointment, he reported that external market factors were responsible for a decline in sales of "Sunkist" brand orange soda; a position contrary to Sunkist's claims that Del Monte's tortious conduct caused much of the decline in sales.[8]

We fail to see how this prejudiced Sunkist or affected its right to a fair hearing. As we noted earlier, a party-appointed arbitrator is permitted, and should be expected, to be predisposed toward the nominating party's case. Several courts have recognized that "entanglement" with and knowledge about relative industry concerns are laudatory

---

[8] In the May 16, 1986, edition of *Beverage Digest*, Mr. Meyers reported:

> Because of looming orange Minute Maid/Slice entries and massive royalty payments--$ 7 1/2 million annually to [Sunkist] Growers--General Cinema sells Sunkist soft drinks rights to Del Monte for $ 57 million, 11/84. At present Coke, Pepsi orange entries in process of pressing Sunkist's segment strength to pulp.

qualifications for those who sit as arbitrators. *See Morelite Constr. Corp. v. New York City Dist. Council Carpenters Ben. Funds*, 748 F.2d 79, 83 (2nd Cir.1984) ("Parties agree to arbitrate precisely because they prefer a tribunal with expertise regarding the particular subject matter of their dispute.... Familiarity with the discipline often comes at the expense of complete impartiality."); *see also Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 150, 89 S. Ct. 337, 340, 21 L. Ed. 2d 301 (1968) (White & Marshall J.J., concurring) ("Arbitrators are not automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance.... I see no reason to disqualify the best informed and most capable arbitrators."). Mr. Meyers merely published his opinions on what was taking place within the soft drink industry. Whether he was correct or not in his opinion, it is not sufficient to disqualify him as an arbitrator.

Finally, Sunkist contends that Mr. Meyers breached his duty of disclosure, by failing to reveal the exact nature and extent of his communications with Del Monte before the arbitration hearings. Under Cannon II, arbitrators are required to disclose only two kinds of information: (1) any direct or indirect financial or personal interest in the outcome of the arbitration, and (2) any existing or past financial, business, professional, family, or social relationships which were likely to affect impartiality or which might reasonably create an appearance of partiality or bias. Cannon VII provides that "disclosure by non-neutral arbitrators should be sufficient to describe the general nature and scope of any interest or relationship...." The record clearly shows that Mr. Meyers announced in his formal disclosure letter that he had been in contact with Del Monte's experts before the parties were notified of his appointment and that he intended to continue to communicate with them after his formal appointment. There has been no showing that Mr. Meyers

had a direct financial or familial relationship with any party to the arbitration. We agree with the district court that Mr. Meyers met his obligations of disclosure according to the AAA rules.

A party-appointed arbitrator must consider the evidence of record in good faith and with integrity and fairness. The fact that Mr. Meyers may have been predisposed towards Del Monte's case is not sufficient to vacate the arbitration award. The evidence relied upon by Sunkist is insufficient to support a finding that Mr. Meyers acted improperly either before or during the arbitration hearing. Therefore, the district court did not abuse its discretion in denying Sunkist's motion to vacate the arbitration award.

For all of the foregoing reasons, the judgment of the district court is AFFIRMED.

APPENDIX B

SUNKIST SOFT DRINKS, INC., Plaintiff,
Del Monte Corporation, Nabisco Brands,
Inc., Plaintiffs-Appellees,

v.

SUNKIST GROWERS, INC.,
Defendant-Appellant.

No. 91-9153.

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

20 F.3d 1175

April 7, 1994, Decided

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

DEL MONTE CORPORATION and NABISCO BRANDS, INC.,	)	
Plaintiffs,	)	CIVIL ACTION No. 1:86-cv-1583-RLV
vs.	)	
SUNKIST GROWERS, INC.,	)	
Defendant.	)	

ORDER

Pending before the court are the defendant's Motion for Leave to File Supplemental Brief in Support of Motion to Vacate, the defendant's Motion to Vacate Arbitration Award, and the plaintiffs' Motion to Confirm.

I. MOTION TO FILE SUPPLEMENTAL BRIEF

Although there are no new significant arguments raised in the supplemental brief filed by the defendant, the

court will nevertheless GRANT the defendant's motion for leave to file supplemental brief in support of motion to vacate.

II. MOTION TO VACATE ARBITRATION AWARD AND MOTION TO CONFORM

The defendant challenges a two-to-one arbitration award entered against it on April 9, 1991 in *In re the Arbitration Between Del Monte Corporation, Nabisco Brands, Inc., RJR Nabisco., Inc. and Sunkist Growers, Inc.* contending that the award should be vacated pursuant to section 10 of the Federal Arbitration Act, 9 U.S.C. §1, *et seq.* The plaintiff, on the other hand, contends that the defendant's challenge to the award is meritless and requests that this court confirm the arbitration award entered by the arbitration panel.

By order of this court of June 7, 1988,[1] the parties to this action were ordered to arbitrate a dispute arising out of a contract which provided that

> any controversy or claim arising out of or relating to this Agreement or the breach thereof, including those regarding termination or failure to renew this Agreement, shall be settled by arbitration in accordance with the Rules of the American Arbitration Association . . . .

The parties also agreed to a specific type of arbitration procedure, providing in their contract that

---

[1] The defendant requests that the court reconsider its order compelling the parties to arbitrate; however, the court declines to reconsider its prior order.

> [t]he Arbitration Tribunal shall be comprised of two party-designated arbitrators, one selected by Sunkist and one selected by SSD, and a third neutral arbitrator selected by the parties in accordance with the Rules of The American Arbitration Association . . . .

The arbitration was conducted before a panel consisting of Sidney O. Smith, Jr., who sat as the neutral arbitrator, C. B. Rogers, who was appointed by the defendant, and Jesse Meyers, who was appointed by the plaintiffs. After completion of the hearings and argument, Judge Smith was joined by Jesse Meyers in the decision to enter an award in favor of the plaintiffs. The defendant's party-designated arbitrator, C. B. Rogers, dissented.

The defendant moves to vacate the award pursuant to section 10 of the Federal Arbitration Act, which provides that a district court may vacate an arbitral award in certain limited circumstances, including

> (1) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> * * *
>
> (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

In invoking subsections (2) and (3), the defendant alleges that the party-designated arbitrator chosen by the plaintiffs is guilty of evident partiality and misbehavior by

which he prejudiced the rights of the defendant.

A. Evident Partiality

The United States Supreme Court considered the standard of conduct to be expected of arbitrators in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 89 S.Ct. 337 (1968). Writing for a plurality of the Court, Justice black construed Section 10 to require that arbitrators meet the ethical standards of federal judges, and he declared that an arbitration panel "not only must be unbiased but also must avoid even the appearance of bias." 393 U.S. at 150, 89 S.Ct. at 340.

However, Justices White and Marshall contributed a concurring opinion in which justice White observed, "the Court does not decide today that arbitrators are to be held to the standards of judicial decorum of Article III judges, or indeed of any judges." Because he did not speak for a majority of the Court, justice Black's words must be considered dicta, and the most restrictive interpretation of the holding, which is found in the concurring opinion, must be given.

The Eleventh Circuit, by which this court is bound, has found that any conduct which creates "a reasonable appearance of bias" warrants setting aside an arbitration award on the ground of "evident partiality." *See Middlesex Mutual Insurance co. v. Levine*, 675 F.2d 1197 (11th Cir. 1982).[2] In deciding whether to vacate an arbitration award based on evident partiality, a court must determine whether

---

[2] In both cases the Eleventh Circuit interpreted the Florida arbitration statute, which allows vacation of arbitral awards for evident partiality only in those situations where a neutral arbitrator's conduct is challenged.

a reasonable person would conclude that the arbitrator was partial and evidence of impropriety must be "direct, definite, and capable of demonstration." 850 F.2d at 1471.

The defendant contends that this court should vacate the arbitration award entered against it because of the evident partiality of Jesse Meyers. The defendant's allegation is apparently based upon mr. Meyers' extensive pre-hearing contact with the plaintiffs, who chose him as their arbitrator. The defendant alleges that prior to the arbitration, but after Mr. Meyers was selected as the plaintiffs' arbitrator, Mr. Meyers assisted the plaintiffs in preparing their case by attending and participating in several meetings with the plaintiffs' witnesses, that he suggested lines or areas of testimony, that he helped select one of Del Monte's consultants and expert witnesses, and that he advised an expert witness, prior to the arbitration hearings, on how to improve a chart related to the expert's testimony.

The defendant contends that evidence of Mr. Meyers' bias is also found in his alleged prejudgment of a dispositive issue in the case. The defendant points to the fact that before Mr. Meyers was appointed as an arbitrator, he expressed his personal opinion in a publication called *Beverage Digest*, a bi-weekly soft drink industry newsletter, of which mr. Meyers is the owner, publisher, editor, and reporter. As a reporter for *Beverage Digest*, Mr. Meyers reported that external factors such as market activities by Coke and Pepsi were responsible for a decline in sales of Sunkist brand orange soda in 1986. It was sunkist's claim in arbitration that Del Monte's contractual breaches and tortious conduct caused much of the decline in sales.

In the May 16, 1986, edition of *Beverage Digest*, Mr. Meyers reported:

> Because of looming orange Minute Maid/Slice entries and massive royalty payments schedule -- $7-1/2 mil annually to [Sunkist] Growers -- General Cinema sells Sunkist Soft Drinks rights to Del Monte for $57 mil 11/84. At present Coke, Pepsi orange entries in process of pressing Sunkist's segment strength to pulp.

Finally, the defendant argues that Mr. Meyers breached his duty to disclose the foregoing, which is further evidence of his evident partiality.

1. Pre-Hearing Contact

The defendant contends that Jesse Meyers' pre-hearing conduct was sufficiently inappropriate to constitute evident partiality within the meaning of Section 10(a)(2) of the Federal Arbitration Act. The defendant points to the fact that not only was Jesse Meyers present at several pre-hearing meetings with the plaintiffs but that he also sat in on preparatory meetings with several of the plaintiffs' witnesses.

The court is persuaded that in determining whether a reasonable person would find that Mr. Meyers' alleged conduct violated the standards expected of arbitrators, the court must take into consideration the particular arbitral process bargained for by the parties when they entered into their contract. While the court is bound to apply the evident partiality standard equally to all arbitrators, the court is not bound to ignore the realities and expectations engendered by the various potential types of arbitration panels. "[T]he parties . . . can ask no more impartiality than inheres in the method they have chosen." *Merit Insurance co. v. Leatherby Insurance Co.*, 714 F.2d 673, 679 (7th Cir. 1983).

The Eleventh Circuit recognized in *Lozano* that a party-appointed arbitrator "is a partisan only one step

removed from the controversy and need not be impartial." 850 F.2d at 1472. In recognition of the inherently different roles of neutral and non-neutral arbitrators, the American Arbitration Association, under whose rules the parties were contractually bound to proceed, imposes less exacting duties upon a non-neutral arbitrator. The AAA imposes less burdensome disclosure rules upon non-neutral arbitrators, and the defendant concedes that in accordance with the Code of Ethics for Arbitrators in Commercial Disputes a party-designated arbitrator is not expected to be neutral and, in fact, may be predisposed or sympathetic to a particular position.

The defendant also concedes that arbitrators may have knowledge about the issues to be considered by the arbitration panel prior to the arbitration process, that they may have formed opinions, that they may have been exposed to the issues that may arise in the arbitration, and that a party-designated arbitrator may communicate prior to the arbitration hearings with his nominating party to familiarize himself with the issue and facts involved in the arbitration.

The court finds that while a reasonable person might consider Mr. Meyers actions questionable were he a neutral arbitrator, Mr. Meyers was chosen as a non-neutral arbitrator by one of the parties, and reasonable person would expect Mr. Meyers' nominating party to choose the person most likely to be sympathetic to its position. The court concludes that since the AAA rules impose lesser duties on non-neutral arbitrators, including allowing prehearing communications between a party and its chosen arbitrator, the AAA recognizes that a party-appointed arbitrator may advocate the position of the party who nominated him or her.

Of concern to the AAA is that non-neutral arbitrators act in good faith and with integrity and fairness. *See* Code of Ethics for Arbitrators in Commercial Disputes, Canon VII.

In defining this standard, Canon VII provides as an example that a non-neutral arbitrator "should not engage in delaying tactics or harassment of any party or witness and should not knowingly make untrue or misleading statements to the other arbitrators." The court finds that the defendant has made no showing that the non-neutral arbitrator engaged in any of this type of prohibited conduct either before or during arbitration proceedings. Therefore, Mr. Meyers' pre-hearing communications with his nominating party did not violate Section 10(a)(2), which prohibits evident partiality on behalf of arbitrators.

2. *Beverage Digest Reports*

The defendant contends that as a reporter for Beverage Digest, a newsletter directed to and concerned with the soft drink industry, Mr. Meyers was deeply entangled in the issues in this case and had already established an opinion as to the appropriate outcome of the arbitration before the hearings commenced. By virtue of Mr. Meyers' activities as a reporter and his published opinion as to the cause of Sunkist's market difficulties, the defendant argues that a reasonable person would find that mr. Meyers was evidently partial as an arbitrator.

First, the business community, as well as several courts of appeal, have recognized that "entanglement" with and knowledge about relevant industry concerns are laudatory qualifications for those who sit as arbitrators. The Second Circuit in *Morelite Construction Corp. v. New York City District Council Carpenters Benefit Funds*, 748 F.2d 79, 83 (2d Cir. 1984), reasoned that

> parties agree to arbitrate precisely because they prefer a tribunal with expertise regarding the particular subject matter of their dispute . . . . Familiarity with

a discipline often comes at the expense of complete impartiality. Some commercial fields are quite narrow, and a given expert may be expected to have formed strong views on certain topics, published articles in the field and so forth.

Second, the defendant has cited no case law, and this court has found none, which supports a finding that Mr. Meyers' relationship to the soft drink industry and, consequently, the plaintiffs, rendered him ineligible to sit as a non-neutral arbitrator in the instant matter. After a review of the pertinent case law, this court concludes that successful challenges to arbitration awards based upon the evident partiality of an arbitrator concern situations involving (1) an arbitrator's direct financial interest in the outcome of an arbitration, (2) an arbitrator's ruling on a grievance that directly concerned his own lucrative employment, and (3) a close family relationship (*viz.*, father-son relationship in which their relationship was directly, definitely, and demonstrably connected to the arbitration) which made the arbitrator's impartiality strongly suspect.

The defendant makes no showing that Mr. Meyers had a direct financial or familial relationship with any party to the arbitration. The defendant instead points to Mr. Meyers' having states his views in his newsletter and opines that Mr. Meyers may have staked his professional reputation on an outcome at arbitration which supported his views. Even were this argument persuasive, the court finds that a desire to be shown correct in one's opinions does not present the same temptations that a financial or blood relationship does. Moreover, a reasonable person would recognize that anyone can change even a publicly held opinion given additional evidence.

Because the defendant has not shown that Mr. Meyers had an interest in the outcome of the arbitration sufficient to render his support of the arbitration award suspect, because it is entirely appropriate, even desirable, for an arbitrator to be knowledgeable about an industry, and because the defendant has made no showing that Mr. Meyers acted in bad faith or acted otherwise improperly, the court rejects the defendant's claim, based on activities in regard to Mr. Meyers' newsletter, that Mr. Meyers was evidently partial.

3. Nondisclosure

The defendant contends that a reasonable person would find that Mr. Meyers was evidently partial because Mr. Meyers allegedly breached his duty of disclosure. The defendant alleges that Mr. Meyers failed to disclose the exact nature of his communications with the plaintiffs prior to the arbitration hearings and that he failed to disclose that he had previously expressed an opinion publicly as to a dispositive issue in this case and had published articles about matters and events involved in this litigation in *Beverage Digest*.

Under Canon II, arbitrators are required to disclose only two kinds of information: (1) any direct or indirect financial or personal interest in the outcome of the arbitration, and (2) any existing or past financial, business, professional, family, or social relationships which are likely to affect impartiality or which might reasonably create an appearance of partiality or bias. Canon VII.B.(1) provides that disclosure by non-neutral arbitrators "need not include as detailed information as is expected from persons appointed as neutral arbitrators."

The court has already found that Mr. Meyers had no inappropriate interest in the outcome of the arbitration and that his relationship with the plaintiffs was appropriate.

Therefore, the court finds no duty to disclose insignificant information, *i.e.*, information which does not create an appearance of partiality or bias.

Moreover, the court notes once against that non-neutral arbitrators such as Mr. Meyers are bound by less rigorous duties than a neutral arbitrator. Canon VII.B.(1) provides, that "disclosure by non-neutral arbitrators should be sufficient to describe the *general* nature and scope of any interest or relationship . . . ." Mr. Meyers announced in his formal disclosure letter of July 6, 1989, that he had been considered as Del Monte's expert before the parties were notified that the instant matter would be arbitrated. Mr. Meyers also disclosed that he intended to continue to communicate with them after his formal appointment. In addition, at a pre-hearing conference on March 6, 1990, Sidney Smith, the neutral arbitrator, suggested that the parties discontinue communications with their arbitrators, but Del Monte announced at that time its intent to continue contact with Mr. Meyers pursuant to Canon VII.C.(2). Subsequent to the pre-hearing conference, the defendant conceded the plaintiffs' right to continue communications with their appointed arbitrator and even declared that it intended to engage in communications with its own arbitrator, C. B. Rogers. Once the hearing began, it is undisputed that communication between Mr. Meyers and his nominating party ended.

While Mr. Meyers did not detail the exact nature of his "communications" with the plaintiffs, he fulfilled his duties, as delineated by the relevant code of ethics, to disclose the general nature and scope of his interest and relationship with the plaintiffs. Therefore, the court finds that the defendant's allegations of inappropriate behavior on behalf of Mr. Meyers are without merit.

B. Misconduct

The defendant contends that Mr. Meyer's meetings with the plaintiffs' witnesses constitutes *ex parte* receipt of evidence in violation of Section 10(a)(3) of the Federal Arbitration Act, which prohibits prejudicial misconduct. The defendant also argues that Mr. Meyers' failure to disclose the prohibited act constitutes prejudicial misconduct.

In *Totem Marine Tug & Barge v. North American Towing, Inc.*, 607 F.2d 649 (5th Cir. 1979), the Fifth Circuit reversed an order confirming an arbitration award because of the prejudicial misconduct of a tripartite arbitration panel. The court found that the arbitrators violated Rule 31 of the American Arbitration Association rules, which provides that all evidence must be taken in the presence of all parties.

In *Totem Marine*, the evidence received *ex parte* was acquired after the hearings had already started, and the evidence revealed that the arbitration panel actually used the evidence in calculating the final award. The facts show that the arbitration panel had closed its hearings, realized during deliberations that its notes reflected inconsistencies figures on the earnings of one of the parties, and that one of the party-appointed arbitrators telephoned that party's counsel to obtain the earnings figure, which the arbitrators used to complete their computations and upon which they based their award.

The court cannot say that Mr. Meyers received *ex parte* "evidence" within the meaning of Rule 31. The facts of this case do not significantly coincide with those found in *Totem Marine*. All communications between Mr. Meyers and his nominating party took place prior to the initiation of hearings and deliberation, and Mr. Meyers complied with Canon VII.C.(2) which allow non-neutral arbitrators to communicate with their nominating party on "any . . . aspect

of the case, provided they first inform the other arbitrators and the parties that they intend to do so."

As previously noted, Mr. Meyers formally declared his intent to communicate with his nominating party. His nominating party expressly indicated that it would continue to communicate with Mr. Meyers and would work with and prepare Mr. Meyers. It cannot seriously be disputed that Mr. Meyers complied with Canon VII. C.(2) which provides that "it is sufficient that there be disclosure of the fact that such communication has occurred without disclosing the content of the communication. It is also sufficient to disclose at any time the intention to follow the procedure of having such communications in the future and there is no requirement thereafter that there be disclosure before each separate occasion on which such communication occurs."

Based on the foregoing, the court finds that within the framework chosen by both parties, and in accordance with federal policy favoring enforcement of arbitration agreements on their own terms, Sunkist received a fundamentally fair hearing. Therefore, the defendant's motion to vacate is DENIED, and the plaintiffs' motion to confirm is GRANTED.

In summary, the defendant's motion for leave to file supplement brief (71-1) is GRANTED; the defendant's motion to vacate arbitration award (67-1) is DENIED; and the plaintiffs' motion to confirm *(68-1) is GRANTED.

SO ORDERED, this 5th day of December, 1991.

/s/
United States District Court Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

DEL MONTE CORPORATION and NABISCO BRANDS, INC.,	)	
Plaintiffs,	)	CIVIL ACTION
	)	No. 1:86-cv-1583-RLV
vs.	)	
SUNKIST GROWERS, INC.,	)	
Defendant.	)	

ORDER

The above-styled civil action ("the Georgia action"), which seeks declaratory relief, was brought by Del Monte[1] against Sunkist. In a related action Sunkist seeks to recover from Del Monte for wrongdoings allegedly committed by Del

---

[1] Nabisco Brands, Inc. is a party plaintiff in the Georgia action and joins Del Monte in the motion to compel arbitration. For ease of reference, "Del Monte" will collectively refer to both Del Monte and Nabisco, unless otherwise indicated.

Monte ("the California action")[2]. In the Georgia action Del Monte filed a motion, pursuant to the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*, to compel Sunkist to submit to arbitration those claims which it has asserted against Del Monte.[3] Del Monte advances two arguments in support of its motion to compel arbitration.

First, Del Monte contends that Sunkist's ten causes of action arise directly from a licensing agreement executed by Sunkist and Sunkist Soft Drinks, Inc. ("SSD"). Del Monte, who owned SSD prior to its being sold to Cadbury Schweppes ("Cadbury"), contends it should be allowed to invoke the agreement's arbitration clause. When this motion came on for a hearing before this court, Del Monte described its first argument as essentially equitable. Del Monte explained that it is fundamentally unfair to allow Sunkist to maintain an action which, for all intents and purposes, sounds in contract, but yet avoid the obligation of submitting such disputes to arbitration as mandated by the agreement. Therefore, Del Monte requests that Sunkist be estopped from attempting to avoid the obligation to arbitrate.

---

[2] Sunkist asserted no claims against Nabisco in the California action; that action has been transferred to this court and is styled *Sunkist Growers, Inc. v. Del Monte Corp.*, Civil Action No. 1:88-cv-126-RLV.

[3] While this motion is technically applicable only to the Georgia action, the facts that the counterclaims in the Georgia action are almost identical to the claims in the California action and that Del Monte requests arbitration of such claims that Sunkist may have against Del Monte, this order will have the practical effect of determining the arbitrability of claims in both the Georgia and California actions.

Second, Del Monte contends that it is entitled to arbitration of Sunkist's claims by virtue of Del Monte's third-party beneficiary status created by the licensing agreement. Del Monte claims that it has attained this third-party beneficiary status because it has succeeded to that status previously occupied by General Cinema Corporation.[4]

As primary support for the argument that Sunkist should be estopped from denying that Del Monte is entitled to arbitration, Del Monte cites *Hughes Masonry v. Greater Clark County School Building Corp.*, 659 F.2d 836 (7th Cir. 1981). In *Hughes Masonry*, the court vacated the district court's ruling that denied a motion to compel arbitration. In reaching this decision, the court held that Hughes Masonry was equitably estopped from avoiding arbitration. The arbitration provision was contained in an agreement executed by Hughes Masonry and Clark County. Hughes Masonry argued that it could not be required to arbitrate because one of the parties with which it had a dispute, J. A. Construction, was not a party to the Hughes Masonry-Clark County agreement. The agreement did, however, recite the duties which J. A. Construction owed to Hughes Masonry and Clark County. The court, therefore, concluded that notwithstanding the facts that Hughes Masonry's action against J. A. Construction sounded in tort and that J. A. Construction was not a signatory to the agreement, Hughes Masonry was actually suing to hold J. A. Construction to the terms of the

---

[4] General Cinema Corporation ("GCC") is Del Monte's predecessor in interest. GCC originally obtained from Sunkist the right to market soft drinks under the "Sunkist" trademark. To accomplish the production and marketing of these soft drinks, GCC created a subsidiary corporation, SSD. SSD thereupon entered into the licensing agreement with Sunkist. In November 1984, Del Monte purchased SSD from GCC.

agreement. Consequently, the court refused to allow Hughes Masonry to characterize failures to perform specific duties as tortious interferences with contractual relations in order to avoid arbitration. 659 F.2d at 840.

In the case *sub judice*, the licensing agreement which contains the arbitration clause does not specify any duties or responsibilities which Del Monte owes to Sunkist. Sunkist argues that the absence of this crucial fact makes *Hughes Masonry* distinguishable from the instant action. The court does not share Sunkist's belief that this distinction has any talismanic significance. Rather, the court is persuaded that the true import of *Hughes Masonry* lies in the court's willingness to examine the factual allegations giving rise to a cause of action to determine whether it actually constitutes a breach of an obligation contained in an underlying agreement.

Evaluating Sunkist's causes of action under Delaware law, which all parties agree controls in this action, the court is convinced that Sunkist is actually suing to enforce provisions of the licensing agreement.

For instance, in its complaint in the California action, Sunkist claimed in Count 6 that Del Monte, SSD, and Does 1 through 20, committed a breach of contract. Roughly eight months later when Sunkist answered and counterclaimed in the Georgia action, Sunkist styled its sixth counterclaim for relief as a conspiracy to breach the contract, despite the fact that both contained almost identical allegations.[5]

Count 7 of the California action alleged "breach of the covenant of good faith and fair dealing" but was changed to

---

[5] The sixth counterclaim for relief dropped the allegation contained in the sixth cause of action that the defendants are jointly and severally liable for the breach.

a "conspiracy" to breach in the seventh counterclaim for relief in the Georgia action. In Count 7, Sunkist stated that as a "direct and proximate result of the breaches" it incurred certain damages. In the seventh counterclaim Sunkist stated that as a "direct and proximate result of the foregoing conspiracy to breach" it incurred particular damages. In all other respects Count 7 of the California action is identical to counterclaim 7 of the Georgia action.

These changes in the styling of the allegations from breach to conspiracy to breach evince a motive by Sunkist to have this court view its claims as sounding in tort rather than contract. The court, however, is unwilling to allow these cosmetic modifications to transform the case from contract to tort. The fact that Sunkist's original complaint did not sound exclusively in tort gives rise to the inference that Sunkist itself believed it was, to some extent, suing on the contract originally. Its present posture in arguing that it is not suing on the contract is nothing more than post hoc rationalization to avoid arbitration.

Some of the factual allegations contained in both the California and Georgia actions also belie the notion that Sunkist is not suing on the contract. For example, Sunkist repeatedly alludes to the fact that SSD was sold to Cadbury in violation of the licensing agreement. The agreement states that SSD could not be sold to an entity whose net worth, when added to the net worth of SSD, totaled less than $50 million. Sunkist alleges that Cadbury was insufficiently capitalized, thereby rendering its purchase of SSD violative of the $50 million requirement. Sunkist also alleges that the defendants were aware of these facts. As a result, Sunkist contends that if it had known this state of affairs earlier, it would have taken the remedial action of voiding the licensing agreement. An inability to take this action has allegedly resulted in damage to Sunkist.

Sunkist relies on the violation of the $50 million requirement either exclusively or in combination with other alleged wrongdoings to establish at least five of its causes of action. Sunkist relies exclusively on this violation to establish its ninth counterclaim for fraud and misrepresentation.

Under Delaware law to establish a prima facie case for intentional misrepresentation or fraudulent concealment a plaintiff must prove that: (1) there was a deliberate concealment by the defendant of a material past or present fact, or silence in the face of a duty to speak; (2) the defendant acted with scienter; (3) there was an intent to induce plaintiff's reliance upon the concealment; (4) there was causation; and (5) damages resulted from the concealment. *See Stevenson v. Capano Development, Inc.*, 462 A.2d 1069, 1974 (Del. Supr. 1983).

The court focuses on the first element. A fact is material if a reasonable person would desire to know of it prior to making a decision about a particular transaction. What a reasonable person would desire to know is an objective and not a subjective matter. *Lock v. Schreppler*, 426 A.2d 486, 863 (Del. Super. 1981); *see also* Restatement, Restitution, § 8(2) (1936). Analyzing the relationship of Del Monte and Sunkist, as it existed at the time the alleged concealments and misrepresentations were made, in light of this objective standard, the court is persuaded that the fraud claim, as worded, seeks recovery for contract breach and not tortious conduct.

It is not entirely clear from the evidence and arguments submitted to the court by the respective parties exactly what the relationship was between Del Monte and Sunkist at the time SSD was sold to Cadbury. The existence and extent of any negotiations or discussions between the two principals have not been clearly established. Aside from the

allegation that Del Monte misrepresented, either "expressly or impliedly" the aggregate value of SSD and Cadbury, there is no indication of how much other information the parties shared. For instance, did Del Monte know specifically of the $50 million requirement and the significance attached to it by Sunkist? These facts are crucial because they affect the application of the objective standard in determining materiality.

A reasonable person in the place of Del Monte could not be expected to know the specific capitalization requirement and its corresponding importance to Sunkist without some external source imparting that information. That is not to say, however, that a reasonable person could not regard the worth of a corporation as a material fact. But simply because net worth may be material does not necessarily mean that a threshold net worth requirement is also material. A threshold capitalization requirement, without more, can only be subjectively material. Only if there were a shared knowledge of the $50 million requirement and of the consequences which would flow from failing to satisfy it, could a reasonable person regard it as significant in electing a course of conduct.

To hold otherwise would impose a duty upon those doing business with individuals under contract with third parties to know the details of those contracts in order to avoid inducing them to act to their detriment under the contracts. Clearly, the common law of torts does not impose such a particularized duty. This particularized duty which Sunkist seeks to impose upon Del Monte flows from a contract and not the law of torts. Where materiality for fraud purposes is controlled or affected by a contract, an inference that one is actually suing to enforce a contract is clearly not unjustified. Sunkist's eighth counterclaim involving civil conspiracy against Del Monte and its tenth counterclaim for declaratory

relief are similarly plagued in that they rely on the $50 million requirement to impose a particular duty upon Del Monte. Sunkist's insistence upon enforcing, in one form or another, the $50 million requirement strongly suggests that Sunkist's action is predicated on contract.

Sunkist's emphasis on and preoccupation with the $50 million requirement is a product of the licensing agreement with SSD. Therefore, the court determines that Sunkist's action sounds in contract, not tort, regardless of how Sunkist seeks to label it.

As a result, the court concludes that Sunkist should be equitably estopped from refusing to submit its claims to arbitration. Therefore, Del Monte's motion to compel arbitration is hereby GRANTED.

SO ORDERED, this 2nd day of June, 1988.

ROBERT L. VINING, JR.
United States District Judge

APPENDIX E

TITLE 9, UNITED STATES CODE

§ 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parities, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the

return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

§ 10. Same; vacation; grounds; rehearing

(a) In any of the following cases the United States Court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration --

(1) Where the award was procured by corruption, fraud, or undue means.

(2) Where there was evident partiality or corruption in the arbitrators, or either or them.

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a

mutual, final, and definite award upon the subject matter submitted was not made.

(5) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

(b) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of Title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 or title 5.